

(4)  
No. 96-8516

Supreme Court, U.S.  
**FILED**

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CLERK

**In The  
Supreme Court of the United States**

**October Term, 1997**

◆  
**KENNETH E. BOUSLEY,**

*Petitioner,*

**vs.**

**JOSEPH M. BROOKS, WARDEN,**

*Respondent.*

◆  
**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

◆  
**JOINT APPENDIX**

◆  
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**Petition For Certiorari Filed March 18, 1997  
Certiorari Granted September 29, 1997**

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TERMED R/R

U.S. District Court  
District of Minnesota (Duluth)

## CIVIL DOCKET FOR CASE #:94-CV-87

Bousley v. Brooks

Filed: 07/05/94

Assigned to: Judge David S Doty

Referred to: Magistrate Judge  
Raymond L Erickson

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 28:2241 Petition for Writ of Habeas Corpus

KENNETH EUGENE  
BOUSLEY  
plaintiff

Kenneth Eugene Bousley  
#04450-041  
[COR LD NTC] [PRO SE]  
Federal Prison Camp  
Box 1000  
Duluth, MN 55814

v.

JOSEPH M. BROOKS,  
Warden defendant

Jeffrey S Paulsen  
[COR LD NTC]  
US Atty Office  
600 US Courthouse  
300 4th St S  
Mpls, MN 55415  
(612) 664-5600

- 7/5/94      1    APPLICATION AND ORDER (Magistrate  
Judge Franklin L Noel /6/30/94 granting  
ifp (copy mailed to petitioner) (cb)
- 7/5/94      2    FEDERAL PETITION FOR WRIT OF  
HABEAS CORPUS, together w/mem-  
orandum in support & exhibits -



- Assigned to Judge Michael J. Davis per habeas corpus list and referred to Magistrate Judge Raymond L. Erickson (cc: U S Atty) (Separate) (cb) [Edit date 06/21/95]
- 7/6/94 3 ORDER TO SHOW CAUSE ( Magistrate Judge Raymond L. Erickson) rtble 20 days (cc: all counsel) (cb) [Entry date 07/07/94]
- 7/6/94 3 REPORT AND RECOMMENDATION ( to judge Michael J. Davis) ( Magistrate Judge Raymond L. Erickson / 7/6/94) RECOMMENDED: That this petition be reassigned for disposition to the Hon Diana E Murphy (cc: all counsel) (cb) [Entry date 07/07/94]
- 7/21/94 4 MOTION of the United States to dismiss (to Magistrate Judge Raymond L. Erickson), or in the alternative for summary judgment (to Magistrate Judge Raymond L. Erickson) (cb) [Entry date 07/25/94] [Edit date 05/22/95]
- 7/21/94 5 MEMORANDUM by United States in support of motion to dismiss (to Magistrate Judge Raymond L. Erickson) [4-1], of motion for summary judgment ((to Magistrate Judge Raymond L. Erickson) [4-2] (cb) [Entry date 07/25/94]
- 7/21/94 6 EXHIBITS to the memorandum in support of motion of the United States to dismiss petition for writ of habeas corpus (cb) [Entry date 07/25/94]
- 7/25/94 7 ORDER (Magistrate Judge Raymond L. Erickson / 7/25/94) The petr shall have until 8/15/94 in which to respond to respondent's submission requesting that

- the petition for a writ of habeas corpus be denied & the case dismissed. (cc: all counsel) (cb) [Entry date 07/26/94]
- 7/26/94 8 ORDER (Judge Michael J. Davis / 7/25/94) adopting report & recommendation [3-1] Case reassigned to Chief Judge Diana E. Murphy (cc: all counsel) (cb) [Edit date 06/21/95]
- 8/12/94 9 REPLY by pltf to motion to dismiss [4-1] & for summary judgment [4-2]. (cb) [Entry date 08/15/94] [Edit date 06/21/95]
- 10/13/94 10 NOTICE (Clerk Francis E Dosal / 10/13/94) Case reassigned to Judge David S Doty (cc: all counsel) (1 pg) (sa) [Entry date 10/17/94]
- 3/14/95 11 REPORT AND RECOMMENDATION (to Judge David S Doty) (Magistrate Judge Raymond L. Erickson / 3/14/95) that the petition for a writ of habeas corpus be dismissed. (cc: all counsel) (11 pgs) (sa) [Entry date 03/15/95]
- 3/27/95 12 OBJECTIONS by pltf to Report and Recommendation [11] (7 pgs) (sc)
- 4/3/95 13 RESPONSE by defendant to report & recommendation objection [12-1] (1 pg + exh) (cb) [Entry date 04/05/95]
- 5/22/95 14 ORDER (Judge David S Doty / 5/18/95) adopting report & recommendation [11]; granting def't's motion to dismiss & granting motion for summary judgment [4]; that the petition for a writ of habeas corpus is dismissed. (cc: all counsel) (1 pg) (sa)

- 5/22/95 15 JUDGMENT (1 pg) (sa)
- 6/20/95 16 NOTICE OF APPEAL by pltf from Judge David S. Doty's order & judgment dated 5/22/95. [14-2] [15-1] (2pgs) (cf) [Entry date 06/21/95]
- 6/21/95 - DELIVERED TWO CERTIFIED and one uncertified copy of each of the following to the Court of Appeals, St. Paul Office: Notice of Appeal, Order, Judgment, Report & Recommendation and District Court Clerk's Docket Entries. Copy of Notice of Appeal mailed to counsel (cf) [Edit date 06/21/95]
- 7/3/95 - NOTIFICATION BY CIRCUIT COURT of Appellate Docket Number 95-2687MND (cb) [Entry date 07/06/95]
- 3/12/96 17 COPY OF ORDER OF USCA (Dated 3/8/96) appointing Lomax Marshall Smith of St. Paul, MN to represent the appellant on appeal under the CJA (1 pg) (cn) [Entry date 03/15/96]
- 1/6/97 18 CERTIFIED COPY OF OPINION FROM USCA (Bowman) (Beam) (Loken) - J; filed 10/3/96 affirming the decision of the District Court [16-1] (8pgs) (cc: All Counsel) (cn)
- 1/6/97 19 CERTIFIED COPY of judgment from USCA MANDATE ISSUED 1/2/97 (Notice to Counsel) (1pg) (cn)
- 4/23/97 20 COPY OF LETTER from the Supreme Court stating certiorari has been filed (2pgs) (cn)

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION  
Criminal No. 4-90-57

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	SUPERSEDING
	)	INDICTMENT
v.	)	21 U.S.C. §841(a) (1)
KENNETH EUGENE BOUSLEY,	)	18 U.S.C. §924(c)
Defendant.	)	(Filed May 23, 1990)

THE UNITED STATES GRAND JURY CHARGES THAT:

COUNT I

On or about March 19, 1990, in the State and District of Minnesota, the defendant,

KENNETH EUGENE BOUSLEY,

knowingly and intentionally possessed with the intent to distribute approximately seven pounds of methamphetamine, a controlled drug substance in violation of Title 21, United States Code, Section 841 (a) (1).

COUNT II

On or about March 19, 1990, in the State and District of Minnesota, the defendant,

KENNETH EUGENE BOUSLEY,

knowingly and intentionally used the following firearms during and in relation to a drug trafficking crime; namely,

the crime of possession of methamphetamine with the intent to distribute it which is a felony that may be prosecuted in a court of the United States:

A loaded Walther PBK .38 caliber handgun, serial no. A016494;

A loaded .22 caliber Advantage Arms 4-shot revolver;

A loaded .22 caliber North American Arms handgun, serial no. C7854;

A loaded .45 caliber Colt Model 1911 semi-automatic handgun, serial no. 244682;

An unloaded Ruger .357 caliber revolver, serial no. 151-36099;

all in violation of Title 18, United States Code, Section 924(c).

A TRUE BILL

/s/ Jerome G. Arnold  
UNITED STATES  
ATTORNEY

/s/ illegible  
FOREPERSON

(Exhibit A)  
UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION  
Criminal No. 40-90-57

UNITED STATES OF	)	
AMERICA,	)	
Plaintiff,	)	PLEA AGREEMENT AND
	)	SENTENCING
v.	)	STIPULATIONS
KENNETH EUGENE	)	
BOUSLEY,	)	
Defendant.	)	

The United States, by its attorneys, Jerome G. Arnold, United States Attorney for the District of Minnesota, and Jeffrey Paulsen, Assistant United States Attorney, and the defendant Kenneth Eugene Bousley, and his attorney Mark Peterson, Esq., hereby agree to dispose of this case on the following conditions:

FACTUAL BASIS

1. The government and the defendant agree that on or about March 19, 1990, in the State and District of Minnesota, the defendant, Kenneth Eugene Bousley, knowingly and intentionally possessed with the intent to distribute methamphetamine. This offense took place at the defendant's residence at 5239 Humbolt Avenue North, Minneapolis, Minnesota. During the execution of a search warrant, law enforcement officers seized a total of approximately seven pounds of methamphetamine from the following locations: 3,153 grams from two briefcases



in the garage; 33 grams from a coffee can in the garage; 6.9 grams from the bedroom in the house. (See attached laboratory report). The government's position is that the defendant knew of and is accountable for the entire quantity of methamphetamine found. The defendant contends that he knew of the existence only of the methamphetamine found in the coffee can (33 grams) and in the bedroom (6.9 grams). The conduct described in this paragraph constituted a violation of Title 21, United States Code, Section 841 (a) (1).

2. The parties also agree that, on or about March 19, 1990, in the State and District of Minnesota, the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The defendant admits ownership and possession of these two guns. This conduct constituted a violation of Title 18, United States Code, Section 924(c). Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun, serial number C7854; a loaded .45 caliber Colt Model 1911 semiautomatic handgun, serial number 244682; an unloaded Ruger .357 caliber revolver, serial number 151-36099. The defendant denies knowledge of these three guns.

### PLEA AGREEMENT

3. The defendant will plead guilty to Counts I and II of the Superseding Indictment. Count I charges the defendant with possession with the intent to distribute approximately seven pounds of methamphetamine in violation of 21 U.S.C. §841(a) (1). That charge carries a statutory penalty of a minimum of ten years imprisonment up to a maximum of life imprisonment, a fine of up to four million dollars, or both, a supervised release term of five years, a mandatory special assessment of \$50, and the assessment to the defendant of the costs of prosecution, imprisonment, and supervision. Count II charges the defendant with using a firearm during and in relation to a drug-trafficking offense. That charge carries a mandatory statutory penalty of five years imprisonment, which must be served consecutively to any other sentence imposed, and a special assessment of \$50.

4. There is no limit on the term of imprisonment that the Court may impose and the defendant agrees to be sentenced in accordance with the applicable Sentencing Guidelines. The defendant understands that a mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. 21 U.S.C. §841(b) (1) (A) (viii). He further understands that a mandatory five-year consecutive sentence applies to the gun offense. There also is no agreement as to fine, supervised release, or costs. The defendant agrees to pay the \$50 special assessment.

5. Despite the fact that Count I carries a mandatory minimum penalty of ten years, the defendant is free to

argue that the mandatory minimum does not apply because he did not knowingly possess more than 100 grams of methamphetamine with intent to distribute.

#### GUIDELINE FACTORS

6. The defendant understands that he will be sentenced in accordance with the applicable Sentencing Guidelines under the Sentencing Reform Act of 1984. The proper application of those guidelines is a matter solely within the discretion of the Court. The parties have, however, agreed upon the following position of the parties with respect to sentencing factors.

##### 7. *Count I.*

(a) *Base Offense Level.* According to the laboratory report (copy attached hereto) a total of 3,192.9 grams (3.19 kilograms) of a mixture containing methamphetamine was recovered from the defendant's residence. Although some of the packages seized contained a mixture of methamphetamine and amphetamine (as well as adulterant), the Sentencing Guidelines require the entire quantity to be treated as if it were methamphetamine. U.S.S.G. at page 2.45 n.\*. 3.19 kilograms of methamphetamine corresponds to a base offense level of 34.

Despite the foregoing, the defendant is free to argue that his base offense level should be decreased, and that the ten-year mandatory minimum does not apply, because he did not knowingly possess all of the methamphetamine seized at his residence. The government, on the other hand, contends that the relevant conduct far

exceeds the 100-gram threshold. The parties agree to allow the court to resolve this dispute, which is a sentencing factor only, not an element of the offense. *E.g., United States v. Padilla*, 869 F.2d 372, 381 (8th Cir. 1989).

(b) *Specific Offense Characteristics.* The specific offense characteristic of using a firearm does not apply to Count I because the defendant is pleading guilty to a separate offense under 18 U.S.C. §924(c). Increasing the base offense level by two levels for use of a firearm would therefore represent double counting.

(c) *Adjustments.* The parties agree that none of the adjustments set forth in Guideline Sections 3A1.1 through 3C1.1 is applicable in this case.

(d) *Acceptance of Responsibility.* The Court will decide whether the defendant is entitled to a two-point reduction for acceptance of responsibility.

(e) *Criminal History Category.* The parties believe the defendant's criminal history category is I based on no known convictions. If the defendant's criminal history category as finally computed is greater than Category I, the defendant may not withdraw his plea based upon that ground and agrees to be sentenced in accordance with the applicable Sentencing Guidelines.

(f) *Guideline Range.* Assuming an offense level of 34 and a criminal history category of I, the guideline range is 151-188 months imprisonment without parole. Assuming an offense level of 32 and a criminal history category of I, the guideline range is 121 to 151 months imprisonment without parole. A ten-year mandatory minimum period of imprisonment applies in this case.

(g) *Fine Range.* Assuming an offense level of 32 or 34, the fine range is \$17,500 to \$4,000,000.

(h) *Supervised Release.* Both the statute and the guidelines require a term of supervised release of at least five years. 21 U.S.C. §841(b) (1) (A); Guideline Section 5D1.2(a).

8. *Count II.* Count II carries a mandatory five-year consecutive period of imprisonment. 18 U.S.C. §924(c).

9. The above-stated position in the parties with respect to sentencing factors is not binding upon the Court. If the factors are determined by the Court to differ from those stated above, the defendant shall not be entitled to withdraw from the plea agreement.

The foregoing accurately sets forth the full extent of the plea agreement and the sentencing stipulations in the above-captioned case.

Dated: 6/14/90

JEROME G. ARNOLD  
United States Attorney  
/s/ Jeffrey S. Paulsen  
BY: Jeffrey S. Paulsen  
Assistant United States Attorney  
Attorney ID No. 144332

Dated:

KENNETH EUGENE BOUSLEY  
Defendant

Dated:

MARK PETERSON  
Attorney for Defendant

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

United States of America,	:	4-90 Crim. 57
Plaintiff,	:	Minneapolis, Minnesota
-vs-	:	June 15, 1990
Kenneth Eugene Bousley,	:	9:00 o'clock a.m.
Defendant.	:	

TRANSCRIPT OF PROCEEDINGS  
(Change of Plea)

BEFORE THE HONORABLE DIANA E. MURPHY,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:  
Jeffrey E. Paulsen,  
Assistant U. S. Attorney

For the Defendant:  
Mark W. Peterson

Court Reporter:  
Edith M. Ritto  
552 U.S. Courthouse  
Minneapolis, Minnesota



[p. 2] PROCEEDINGS

THE CLERK: Your Honor, the first matter on the calendar is United States versus Bousley.

MR. PAULSEN: Jeff Paulsen on behalf of the Government, Your Honor.

MR. PETERSON: Mark Peterson appearing with Mr. Bousley, Your Honor.

THE COURT: Good morning. I understand that you have an agreement in this case. I have a copy of a plea agreement and sentencing stipulations. My copy doesn't indicate that it's been executed, though.

MR. PAULSON: It has been now, Your Honor, and I would tender the executed copy to the Court.

THE COURT: Okay. Mr. Paulsen, do you want to state the main points of the agreement? Obviously, it's very detailed, and I don't expect you to go over all of it.

MR. PAULSEN: The main points, Your Honor, are that the defendant is going to plead guilty to both Counts I and II of the superseding indictment.

Count I charges that he possessed methamphetamine with the intent to distribute it. The actual amount of methamphetamine involved is left for the Court to decide as a sentencing factor.

The Government takes the position that the relevant conduct includes the entire seven pounds of methamphetamine [p. 3] that was found during the search. And Mr. Peterson would like to argue for a lower amount. He reserves his right to do so.

The defendant is aware that if the relevant conduct exceeds 100 grams, then there's a mandatory ten-year minimum penalty on Count I.

With respect to Count II - that's the gun charge under 924(c) - the defendant is going to plead guilty to that. There's no agreement whatsoever on the penalty there. That carries a mandatory five-year consecutive penalty.

Basically, that's the gist of the agreement. Is that the way you understand it, Mr. Peterson?

MR. PETERSON: Yes, it is.

MR. PAULSEN: And Mr. Bousley?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, Mr. Paulsen, as I understand the agreement, Mr. Bousley is not going to deny the elements of the offense - in other words, a knowing and intentional possession - but, rather he's going to be free to argue that he didn't know it was the amount that the Government alleges. Is that a fair statement?

MR. PAULSEN: Yes. I understand that methamphetamine was found in three different locations in the house and the garage, and he's going to admit to two of the locations. And I don't believe today he's going to admit to one of the other locations where the bulk of the drugs was [p. 4] found.

The Government is taking the position it is. Because of previous statements Mr. Bousley made, we think that as a sentencing factor, we'll be able to convince the Court that he is accountable for all seven pounds.

THE COURT: And do counsel anticipate that this determination that the Court would make under the agreement would be made upon stipulated facts or that there would be an evidentiary hearing? Or haven't you discussed that?

MR. PAULSEN: We haven't discussed that formally, Your Honor. I propose, of course, to submit all the reports and records I have to the Probation Office, which I imagine will make a recommendation in the first instance.

And at that point, depending on which way that comes out, one or the other of us, I imagine, will be filing some objections. And it may be necessary to have an evidentiary hearing at the time of sentencing.

MR. PETERSON: I would agree with that. I think it really depends on what the presentence report comes up with.

THE COURT: Okay. I would say this, that if Mr. Bousley does plead guilty today, that you notify the Court in advance of the sentencing hearing whether you are going to require an evidentiary hearing and, if so, how many witnesses and how long it would be, for purposes of scheduling. Obviously, if there are going to be witnesses, it's going to [p.5] take more than the normal time that we would schedule.

MR. PAULSEN: We'll do that.

THE COURT: Okay, Fine. Well, Mr. Bousley, I'm going to ask that you take an oath, and if you were to make any false statement after taking an oath, you could

be prosecuted for an additional offense - that is, the offense of perjury. Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor.

KENNETH EUGENE BOUSLEY, being first duly sworn, testified as follows:

THE COURT: Mr. Bousley, how old are you?

DEFENDANT BOUSLEY: Thirty-eight.

THE COURT: And what kind of education have you had?

DEFENDANT BOUSLEY: Eleventh grade.

THE COURT: Have you taken any kind of medication today?

DEFENDANT BOUSLEY: No.

THE COURT: I notice that you're using a cane today. Is that something that you do all the time, or have you had a particular injury?

DEFENDANT BOUSLEY: Artificial leg.

THE COURT: Would that condition in any way affect your ability to make a voluntary decision or to understand what's being said in court?

DEFENDANT BOUSLEY: No. [p. 6]

THE COURT: Have you taken any drugs or alcoholic beverages today?

DEFENDANT BOUSLEY: No.

THE COURT: Now, did you listen while Mr. Paulsen outlined some of the features of the plea agreement?

DEFENDANT BOUSLEY: Yes, I did.

THE COURT: Do you disagree with anything that he said about it?

DEFENDANT BOUSLEY: No.

THE COURT: And do you understand that if you plead guilty according to this agreement, you would be facing a possible 15-year sentence?

MR. PAULSEN: Mandatory minimum.

THE COURT: Yes. Do you understand that?

DEFENDANT BOUSLEY: Ten years plus the gun charge?

THE COURT: Right, which would have to be consecutive.

DEFENDANT BOUSLEY: Yes.

THE COURT: And has Mr. Peterson talked with you, gone over with you, all the details of this written plea agreement?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has he discussed with you the pluses and minuses from your point of view?

DEFENDANT BOUSLEY: Yes.

[p. 7] THE COURT: And has he discussed with you the sentencing guidelines and how they could apply to your case?

DEFENDANT BOUSLEY: Yes, he has.

THE COURT: And under this agreement, you're leaving it up to the Court to determine what the amount of the drugs that should be credited to you would be. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: And you wouldn't be able to withdraw your plea agreement if the Court's decision goes against your version. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: And has Mr. Peterson talked with you about the charges in the superseding indictment and the possible defenses you could raise if you were to go to trial?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has he talked with you about the rights that you'd be giving up if you were to plead guilty?

DEFENDANT BOUSLEY: Yes, he has.

THE COURT: Are you satisfied with the job that he's done for you?

DEFENDANT BOUSLEY: Yes.

THE COURT: Has anybody threatened you in any way to get you to plead guilty?

DEFENDANT BOUSLEY: No.

[p. 8] THE COURT: Has anybody made you any promise that's not incorporated in this written plea agreement?



DEFENDANT BUOSLEY [sic]: No.

THE COURT: Now, the rules do require that I go over the rights that you'd be giving up, because they are very important rights. You have the right, of course, to be represented by an attorney, and you have the right to a jury trial, which encompasses many other rights.

You and your lawyer would be able to participate in the selection of a fair and impartial jury of twelve people, and the jury would be informed about the law that applies in your case. They'd be told a number of times that you're presumed to be innocent of these charges, that the burden of proof is entirely on the Government, and that the burden of proof at trial for the Government is proof beyond a reasonable doubt.

Now, the burden of proof on the sentencing factors is much less, and the law would indicate in our Circuit that it's probably a preponderance of the evidence, which is a much lower standard. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: So that the burden of proof that the Government would have in any sentencing determination would be much less than if you were to go to trial and the jury were to be determining your guilt. Do you understand that?

[p. 9] DEFENDANT BOUSLEY: Yes.

THE COURT: And do you understand that any verdict of the jury would have to be unanimous? In other words, for you to be convicted, all twelve jurors would

have to be persuaded by the Government beyond a reasonable doubt that you were guilty. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: You'd have the right to cross-examine or question any witness the Government brought against you at trial. You wouldn't have any obligation to put on any evidence because of the burden of proof being on the Government. If you wanted to call witnesses, you could use the Court's subpoena power.

You could testify just like any other witness. If you chose not to testify at trial, however, no one could mention that in front of the jury. And no one could force you to take the witness stand against your will.

If you were to be convicted at trial, you'd be able to appeal that conviction to the Court of Appeals. You'd be able to appeal any adverse ruling that the Court had made against you.

But if you plead guilty, you'd be giving up your normal rights of appeal. Do you understand that?

DEFENDANT BOUSLEY: I could appeal the sentence?

THE COURT: You wouldn't be able to appeal your [p. 10] conviction - do you understand that? - the liability phase. In other words, you wouldn't be able to appeal whether or not you're guilty.

DEFENDANT BOUSLEY: Yes, I understand that.

THE COURT: And also by this agreement – under the sentencing guidelines, there is a right to appeal from a sentence. You understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: But under the plea agreement, you'd be giving up some of the rights that you would have as far as that goes, too. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, do you understand, if you plead guilty, there would be no trial, and you'd be giving up all those rights?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Okay. Now, I'm not going to go into all the factors that the Court would look at in considering how the guidelines would implicate on your sentencing, but we've referred to the statutory provisions that come into play in your case and the one determination that the Court would be making about the amount of the substance.

But the Court would also be looking at other factors, and it would only be after the Court gets this presentence report that the Court would be able to determine [p. 11] and calculate these various factors.

The Court would be looking at any prior criminal activity, whether you had been truthful, apparently, in talking with the Probation Office, all other circumstances. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Now, do you understand what it is that you're charged with in the indictment?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: Okay. Count I – can you tell me what you're charged with in Count I?

DEFENDANT BOUSLEY: Possession with intent.

THE COURT: Possession of what with intent?

DEFENDANT BOUSLEY: Methamphetamine.

THE COURT: Okay. And you're charged with the intent to distribute that amount, is that correct?

DEFENDANT BOUSLEY: Yes.

THE COURT: Now, that count refers to a time of on or about March 19, 1990. Where were you on or about that day, and what were you doing insofar as it relates to this charge?

DEFENDANT BOUSLEY: I was at home, taking care of my daughter.

THE COURT: And where is your home?

DEFENDANT BOUSLEY: 5239 Humboldt Avenue North, Minneapolis.

[p. 12] THE COURT: All right. And did you have in your possession at your house some methamphetamine?

DEFENDANT BOUSLEY: Yes.

THE COURT: And were you at that time – what were you planning to do with that methamphetamine that you had in your house?

DEFENDANT BOUSLEY: The meth that I had I was planning on selling.

THE COURT: Would you expand upon that a little bit?

DEFENDANT BOUSLEY: I had an ounce and a quarter in the garage in a coffee can, and then I had about six ounces in the house.

MR. PETERSON: Six ounces or grams?

DEFENDANT BOUSLEY: Or grams.

THE COURT: And what were you planning to do with that?

DEFENDANT BOUSLEY: Well, the six that were in the house, that was mine; I was going to use for myself. And the ounce and a quarter that was in the coffee can was for sale, that I was going to sell.

THE COURT: And did you know that this was against the law?

DEFENDANT BOUSLEY: Yes.

THE COURT: And do you believe that if you were to go to trial, the Government would be able to prove that that [p. 13] substance was, in fact, methamphetamine?

DEFENDANT BOUSLEY: Yes.

THE COURT: I say again, do you know that after the Court will certainly listen to everything offered

by both sides and my decision as far as how much should be attributed to you could go in your favor, it could also go in the Government's favor. Do you understand that?

DEFENDANT BOUSLEY: Yes, I do.

THE COURT: And Count II – do you know what you were charged with in that count? Can you tell me?

DEFENDANT BOUSLEY: Possession of a firearm.

THE COURT: Okay. Now, it also charges you with possessing the firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would you tell me what kind of weapons you had at the time in question?

DEFENDANT BOUSLEY: There was a .22 four-shot derringer and a PBK 380 automatic pistol.

THE COURT: I think there are five weapons that are charged in the indictment. Is that correct?

MR. PAULSEN: Maybe we can break that down a little bit.

THE COURT: Go ahead, Mr. Paulsen.

[p. 14] (The following questions asked by Mr. Paulsen and answers given by Defendant Bousley.)

BY MR. PAULSEN:

Q. Now, with respect to these two guns you just mentioned, the 380 and the .22, those were found in your bedroom, is that right?



A. Yes.

Q. And that was near that 6.9 grams of methamphetamine that you talked about before, right?

A. Yes.

Q. You don't contest that the police also found about seven pounds of methamphetamine out in your garage in some briefcases, correct?

A. That's what they told me, yes.

Q. All right. And you don't really contest that that was found, do you, by the police during the search warrant?

A. Well, I never seen it, but that's what my understanding is, that they found seven pounds and three other guns in the garage, yes.

MR. PAULSEN: Mr. Peterson, do you have any dispute with that?

MR. PETERSON: I have no dispute with that.

BY MR. PAULSEN:

Q. And in those briefcases, along with the seven pounds of methamphetamine, were three other guns, correct?

[p. 15] A. Yes.

Q. All right. Now, had you been doing some of the selling of the methamphetamine out of your house as opposed to out of your garage?

A. No.

Q. These guns that were found in your bedroom, how were those connected with the drug trafficking? Were those available for you to use in case something went wrong in drug trafficking?

A. No. They were there for protection -

MR. PETERSON: First of all, there's no dispute that the guns were yours, is that correct?

DEFENDANT BOUSLEY: Right.

MR. PETERSON: And, in the past, you had sold drugs from the area of your residence, is that correct?

DEFENDANT BOUSLEY: In the garage, yes.

MR. PETERSON: And if you had needed a firearm during the selling of any of the drugs in the past, the firearms in the bedroom were available to you, is that correct?

DEFENDANT BOUSLEY: They were available, yes.

MR. PAULSEN: Are you satisfied, Mr. Peterson, that there's a factual basis?

MR. PETERSON: I'm satisfied under the state of the law in this Circuit that there is a factual basis for Count [p. 16] II.

BY MR. PAULSEN:

Q. Those guns were loaded, by the way, when they were found in your bedroom, correct?

A. The .22 four-shot was.

Q. And that was found in the headboard of the bed?

A. Yes, in a tape box.

Q. So it was pretty easily accessible if you needed to get to it in a hurry?

A. Well, it was under other boxes, other video cassette boxes, and inside a video cassette box.

THE COURT: Do you understand, Mr. Bousley, if you wanted to contest whether you were guilty to Count II or not, whether those firearms were related to your drug trafficking, if you wanted to contest that, you'd have to go to trial to do that, do you understand, but that you can do that? Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor. But I was just saying - what I meant is, they weren't right out in the open. You know, I couldn't just reach over and grab it.

THE COURT: All right. But I just want you to understand that if you want to contest whether they are related to your drug trafficking, you'd have to go to trial to do that. Do you understand?

DEFENDANT BOUSLEY: Yes.

[p. 17] THE COURT: Okay. Anything else you want to bring out, Mr. Paulsen?

BY MR. PAULSEN:

Q. The search warrant talked about some sales that were made within the previous 72 hours at that location of methamphetamine. You don't dispute, do you, that

you had been making sales from that location within the previous 72 hours?

A. No.

Q. Do you understand that although there's a mandatory 15-year minimum penalty if you're found to be involved with more than 100 grams, the maximum penalty under the statute would be life imprisonment and a \$4 million fine? Do you understand that, under the statute?

A. Yes.

MR. PAULSEN: Nothing further.

THE COURT: And that within the maximum that would apply, the Court would be able to determine what the appropriate sentence was. Do you understand that?

DEFENDANT BOUSLEY: Yes.

THE COURT: Mr. Peterson, is there anything you wanted to bring out at this time?

MR. PETERSON: I have nothing further.

THE COURT: Okay. Mr. Bousley, how do you plead to Count I, guilty or not guilty?

DEFENDANT BOUSLEY: Guilty.

[p. 18] THE COURT: And how do you plead to Count II, guilty or not guilty?

DEFENDANT BOUSLEY: Guilty.

THE COURT: Okay. Mr. Bousley, I find that you're competent to enter these pleas, that they've been

voluntarily entered, and that there is a factual basis for them. And I'll ask Mr. Ray to see that a presentence report is prepared.

We've already referred to that in a way that makes it clear that that's a very important document for you, and you should be sure that you read it. Your lawyer and the Government's attorney will meet with the Probation Officer to see if they can resolve any factual disputes. But if they aren't resolved at that point, then you should be sure that we get written notice of that.

And, as I say, if you believe that there's a need for a more extended hearing, we need to have more specifics about how long that would be and what would be involved ahead of time.

All right. We'll see you, then, at your sentencing hearing.

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Certified: /s/ Edith M. Kitts  
Official Court Reporter

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IN UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA

v.

KENNETH EUGENE BOUSLEY

Docket No. CR 4-90-57

Defendant No. 01

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PRESENTENCE REPORT

<u>Prepared For:</u>	The Honorable Diana E. Murphy U.S. District Court Judge
<u>Prepared By:</u>	Julie M. Belt U.S. Probation Officer (612) 348-1980  426 U.S. Courthouse 110 South Fourth Street Minneapolis, MN 55401-2295
<u>Plea/Verdict:</u>	6-15-90: Pled guilty to Counts I and II of the Indictment.
<u>Offense:</u>	Count I: Possession With Intent to Distribute Methamphetamine, 21 USC 841(a)(1).  Count II: Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 USC 924(c).
<u>Statutory Penalty:</u>	Count I: Mandatory minimum 10 years to life imprisonment, \$4,000,000 fine, at least 5 years supervised release, \$50 special assessment.



Count II: Mandatory 5 years imprisonment to be served consecutive to any other sentence imposed. \$50 special assessment fee required.

Mandatory Minimum: x Yes ☐ No

Plea Agreement: Defendant pled guilty to Counts I and II of the Indictment. Count I carries a mandatory minimum statutory penalty of 10 years imprisonment. Count II requires a 5 year sentence of imprisonment to be served consecutive to any other sentence imposed. There is no limit on the term of imprisonment that the Court may impose. Defendant understands that the mandatory minimum penalty of ten years applies to the drug offense in the event the Court finds that the relevant conduct exceeds 100 grams of methamphetamine. There is no agreement as to the fine, supervised release, or costs. A fifty dollar (\$50) special assessment is required per count (\$100 total).

Arrest Date and Custodial Status: 03-19-90  
05-10-90: Defendant released on \$100,000 cash surety bond with home detention via electronic monitoring.

Detainers: None.

Codefendants: None.

Assistant U.S. Attorney:  
Jeffrey Paulsen  
234 U.S. Courthouse  
110 South Forth Street  
Minneapolis, MN 55401  
(612) 348-1500

Defense Counsel:  
Mark W. Peterson  
Suite 250  
608 2nd Avenue South  
Minneapolis, MN 55402  
(612) 338-2500

Date Report Prepared: 07-18-90 Date Revised:

Identifying Data:

Birth Date: 10-24-51 Age: 38  
Race: White Sex: Male  
FBI #: 13062v1 SSN: 469-64-0492  
Education Completed: 10th grade  
Citizenship: United States  
No. of Dependents: Three  
U.S. Marshal No.: 04450-041  
Other ID No.:  
Legal Address: 5239 Humboldt Avenue North  
Minneapolis, MN 55444  
(612) 529-9045

**PART A. THE OFFENSE**

Charge(s) and Conviction(s)

1. On May 23, 1990, a Two-count Superseding Indictment was returned by the Federal Grand Jury for the District of Minnesota. The Indictment charged defendant, Kenneth Eugene Bousley, with Count I, Possession With Intent to Distribute Seven Pounds of Methamphetamine, in violation 21 USC 841(a)(1). Count II charged the defendant with Use of Firearms During and in Relation to a Drug Trafficking Crime, in violation of 18 USC 924(c).

2. On June 15, 1990, the defendant pled guilty to Counts I and II of the Indictment. He is currently awaiting sentencing.
3. Since the offense took place after November 1, 1987, the Sentencing Reform Act of 1984 is applicable.

#### Related Cases

4. None.

#### The Offense Conduct

5. The following information was obtained from investigative reports completed by the Hennepin-Anoka Suburban Drug Task Force and the Federal Bureau of Investigation Office in Minneapolis, Minnesota.
6. According to a sworn affidavit of Special Agent Kaulfuss, dated March 19, 1990, information was obtained from a confidential informant (CI) regarding the drug trafficking of the defendant, Kenneth Eugene Bousley. The confidential informant indicated that the defendant, who lived at 5239 Humboldt Avenue North, in Minneapolis, Minnesota, sold methamphetamine commonly referred to as "crank". Further information obtained said Bousley typically sold the drug from his garage and that he drove a 1978 Lincoln Continental.
7. Within the past 72 hours, the CI had purchased a quantity of controlled substance from the defendant at his residence which was later field-tested positive for methamphetamine. The confidential informant informed officers that there was more methamphetamine at Bousley's residence.
8. On March 19, 1990, a search warrant was executed at the defendant's residence located at 5239 Humboldt Avenue North, in Minneapolis. Law enforcement officers seized a total of seven pounds methamphetamine from the following locations: 3.153

grams from two briefcases in the garage; 33 grams from a coffee can in the garage; and 6.9 grams from a bedroom in the house. The following firearms were found in the defendant's bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK.380 caliber handgun; and a loaded .22 caliber Advantage Arms 4-shot revolver. Three other firearms were found in the two briefcases containing the bulk of the methamphetamine: a loaded .22 caliber North American Arms handgun; a loaded .45 caliber Colt Model 1911 semiautomatic handgun; and an unloaded Ruger .357 caliber revolver. Also taken during the search warrant were \$4,838.30 in U.S. currency, various ammunition, two scales, packaging material, cutting agent, two police scanners with a listing of scanner frequencies, drug sale records, an air pistol, computer equipment, various identification and documents of the defendant, Kenneth Eugene Bousley, as well as a 1987 Harley Davidson motorcycle. The defendant was present when officers arrived and immediately taken into custody. A fifteen-month-old baby was also present and was subsequently transported to St. Joseph's Hospital.

9. On March 19, 1990, the defendant was interviewed by Special Agents Preston and Jindra. During the interview, Ken Bousley indicated he has been involved in drug trafficking for the past one and one-half years. Defendant admitted that the quantity of methamphetamine seized from the coffee can (33 grams), and the bedroom (6.9 grams), as well as the two firearms belonged to him. Kenneth Bousley denied knowledge of the quantity of drugs and firearms seized from the two briefcases located in the garage. Bousley discussed methamphetamine sales of up to one-half ounce per week and three regular customers. Defendant also stated that \$1,300 of the



\$4,000 seized came from "crank" sales. Bousley admitted to using an eight-ball of methamphetamine per week to support his personal habit. Finally, Kenneth Bousley admitted that his drug source stores methamphetamine in his garage. He states that he weighs out methamphetamine approximately three-to-four times per month for his drug source in usually four ounce quantities. On the day before his arrest, defendant admitted that he weighed out eight ounces of methamphetamine from a bag that may have contained a pound of methamphetamine. Bousley relates that he is very afraid of his source and feels that he would be killed if he knew that the defendant was talking to the police.

Adjustment for Obstruction of Justice

10. There is no indication that defendant Bousley obstructed justice in reference to the investigation or prosecution of this offense.

Adjustment for Acceptance of Responsibility

11. Immediately following his arrest, defendant Bousley provided authorities with two statements concerning his involvement in the instant offense. In his statements, Mr. Bousley appears to be forthright concerning his drug sales, as well as personal use. It is evident that the defendant is afraid of his source and feels he will be killed should he provide information to authorities.
12. On June 15, 1990, a presentence investigation was initiated by this probation officer. It is noted that defendant Bousley cooperated fully during the presentence interview. In addition, the defendant provided the following written statement in regard to his involvement in the instant offense:
13. "Offense - Possession of methamphetamine with intent to distribute

14. "Explanation For Involvement - I needed money to make ends meet. It was hard for me to find and keep a job because of my back problem and artificial leg.
15. "Offense - Possession of firearms
16. "Explanation For Possession - I had the guns for when I wasn't home so Jessie had protection because she had been raped and we didn't want something like that to happen again because the guy was never caught.
17. "On March 19, 1990 at approximately 3:40 pm I was laying on my bed watching TV and my baby was sleeping in the kid's bedroom. The police came through the kitchen door which was unlocked and told me to face down on the bed. They tie wrapped my hands behind my back, searched me and asked if there were any guns in the house. I told them the 22 4-shot Derringer which was loaded was in the video cassette box in the headboard under 4 or 5 other video cassette boxes and the 380 which was unloaded was in the cabinet next to the bed on the bottom shelf inside a closed zippered vinyl bag along with two loaded clips. They asked about drugs. I told them there were two small bags in the liner of the waterbed. I told them it was about five grams. They told me that they had a search warrant and told me I was under arrest. I think they told me my rights. After I told them about the drugs in the liner, I told them about the 1 1/4 oz. in the coffee can in the garage. They kept asking me where the rest of it was that I had more than that. I told them that was all I had. They asked me for the keys to the garage. I told them they were on my belt. They took the keys, my wallet--they took my belt off and emptied my pockets and them(sic) took me into the living room. They then took me to the Brooklyn Park Police Department."



### Offense Level Computation

18. Law enforcement officers seized a total of seven pounds of methamphetamine from the following locations: 3,153 grams from two briefcases in the garage; 33 grams from a coffee can in the garage; and 6.9 grams from a bedroom in the house. The government's position is that the defendant knew of and is accountable for the entire quantity of methamphetamine found. The defendant contends that he knew of the existence only of the methamphetamine found in the coffee can (33 grams) and in the bedroom (6.9 grams). The dispute surrounds the issue of relevant conduct according to Guideline Section 1B1.3.
19. The pertinent rule within 1B1.3 and 1B1.3(a)(1) is as follows:
 

". . . . all acts and omissions committed or aided and abetted by the defendant, or for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;. . . ."

The probation officer's position is that the subject cannot be held accountable for the seven pounds of methamphetamine if the "all acts or omissions, etc." language is used as a basis for that accountability. This subject did not commit or aid and abet in the possession of the seven pounds. This subject cooperated with the FBI in giving information on March 21, 1990. At that time, he claimed the drugs were not his and he was not even aware that the seven pounds of methamphetamine were in his garage. He then went on to give information on his drug dealing activities and information as to where the seven pounds had

- probably come from. His statements at the time of his arrest and later statements to this probation officer were consistent and believable considering all the circumstances of this case.
20. The remaining issue is whether the subject can be held accountable for the seven pounds or some other amount under the "otherwise accountable" language of 1B1.3(a)(1). Application Note No. 1 of 1B1.3 explains the meaning of the term as follows: "In the case of criminal activity undertaken in concert with others, whether or not charged as a conspiracy, the conduct for which the defendant 'would be otherwise accountable' also includes conduct of others in furtherance of the execution of the jointly-undertaken criminal activity that was reasonably foreseeable by the defendant. Because a count may be broadly worded and include the conduct of many participants over a substantial period of time, the scope of the jointly-undertaken criminal activity, and hence relevant conduct, is not necessarily the same for every participant. Where it is established that the conduct was neither within the scope of the defendant's agreement, nor was reasonably foreseeable in connection with the criminal activity, the defendant agreed to jointly undertake, such conduct is not included in establishing the defendant's offense level under this guideline."
  21. The defendant has provided a statement to authorities admitting that between July 1988 and November 1989, he purchased methamphetamine from his source on at least twenty occasions in one ounce quantities. Between December 1989 and February 1990, defendant reports that his source made two one-pound deliveries of methamphetamine per month to his garage. The defendant's job was to

weigh out ounce quantities from the pound deliveries of methamphetamine, according to the source's instructions. During this time period, the defendant admitted to weighing out four ounces methamphetamine per pound for his drug source. On March 18, 1990, defendant's source instructed Kenneth Bousley to go to the garage and "double it" meaning weigh out eight ounces of methamphetamine.

22. Based on information provided by the defendant, it is clear that defendant Bousley had knowledge of approximately two pounds of methamphetamine being periodically present in his garage per month during the latter part of 1989 and early part of 1990. It would be reasonably foreseeable to [sic] would not be reasonably foreseeable to the subject that seven pounds of methamphetamine would be there. It is, therefore, this probation officer's assessment that the quantity of drugs to be used in this case as it pertains to relevant conduct is two pounds or 907.2 grams methamphetamine.
23. Base Offense Level: The guideline section for 21 USC 841(a)(1) offense is 2D1.1. The quantity of drugs in this case is between 700 grams but less than 1 kilogram of methamphetamine; therefore, the base offense level is 30. 30
24. Specific Offense Characteristics: Firearms were possessed during the commission of this offense. However, the defendant was convicted of 18 USC 924(c), and to avoid double counting, no points are added under this specific offense characteristic. 2K2.4, Application Note #2. 0
25. Adjustment for Role in the Offense: None. 0
26. Victim Related Adjustment: None. 0
27. Adjustment for Obstruction of Justice: None. 0

28. Adjustment for Acceptance of Responsibility: -2
29. Total Offense Level. 28

## PART B. THE DEFENDANT'S CRIMINAL HISTORY

### Juvenile adjudications

30. The defendant was arrested on six occasions between the ages of 14 and 17 for Unauthorized Use of Motor Scooters, Motor Vehicles, and a Boat. Court records indicate the defendant spent time on probation at Glen Lake Home School and the Minnesota Correctional Facility at Lino Lakes, Minnesota. At the age of 17, he was committed to the Youth Conservation Commission and sent to the Minnesota Correctional Facility at Red Wing, Minnesota. He was subsequently discharged in February 1970.

### Criminal Convictions

	<u>Date of Arrest</u>	<u>Charge/Agency</u>
31.	02-11-79 (Age 27)	Theft Over \$2500. Plymouth, MN Police Dept.
	<u>Date Sentence Imposed/ Disposition</u>	<u>Guideline/ Score</u>
	3-26-79: Pled guilty to lesser charge of Theft Over \$100.	4A1.2(e)
	4-26-79: Stay of Imposition of sentence for five years. 5 years probation on condition he participate in chemical dependency programming. Discharged from probation on 4-17-84.	<u>0</u>



Represented by Attorney Jon Erickson. According to a criminal complaint, on February 11, 1979, at 3:45 a.m., police officers observed two pickup trucks in the area of an attempted motorcycle theft reported earlier in the day. Three subjects were observed placing the motorcycle in the rear of one of the trucks. The defendant and John Innes were subsequently arrested. A third codefendant, Donald Elwood, Jr., was arrested at Innes' residence located at 6829 Douglas Drive in Brooklyn Park, Minnesota in possession of the motorcycle. The motorcycle was stolen from the V.I.P. Credit Union who previously had repossessed it. The motorcycle was valued at approximately \$2500.

#### Criminal History Computation

32. The above criminal conviction results in a subtotal criminal history score of zero. 0
33. The defendant was not under any criminal justice sentence at the time the instant offense was committed. NA
34. The instant offense was not committed less than two years after release from imprisonment on a sentence previously counted. NA
35. The total of the criminal history points is zero. According to the Sentencing Table, 0 to 1 criminal history points establishes a criminal history category of I.

#### Other Criminal Conduct

36. On January 22, 1977, the defendant was arrested by the Minneapolis Police Department and charged with Driving While Intoxicated. The charge was subsequently dismissed.

#### Pending Charges

37. None.

### **PART C. SENTENCING OPTIONS**

#### Custody

38. Statutory Provisions: Count I carries a mandatory minimum ten years to life imprisonment. 21 USC 841(b)(1)(A). Count II carries a mandatory minimum five years imprisonment to be served consecutive to any other sentence imposed. 18 USC 924(c)(1).
39. Guideline Provisions: Based on a total offense level of 28 and a criminal history category of I, the guideline imprisonment range for Count I is 78 to 97 months. However, Count I requires a mandatory minimum ten-year sentence of imprisonment; therefore, the guideline imprisonment range is 120 months. In addition, the defendant has been convicted of an 18 USC 924(c)(1) offense; therefore, he is statutorily exposed to an additional sixty-months imprisonment to be served consecutive to any other sentence imposed.

#### Supervised Release

40. Statutory Provisions: The Court, in imposing a sentence of imprisonment, must impose a term of supervised release of not less than five years or more than life on Count I. 21 USC 841(b)(1)(A). The Court may impose a term of supervised release of not more than three years to follow imprisonment on Count II. 18 USC 3583(b)(2). The terms of supervised release must run concurrently. 18 USC 3624(e).
41. Guideline Provisions: Count I requires a minimum term of five years supervised release by statute. The guideline term, therefore, must be at least five years. 5D3.2(a). The length of the term of supervised release on Count II, a Class D felony, must be at least two years but not more than three years. 5D3.2(b)(2).



### Probation

42. Statutory Provisions: The defendant is not eligible for probation as the offenses of conviction expressly prohibit such a sentence. 21 USC 841(b)(1)(A) and 18 USC 924(c)(1).
43. Guideline Provisions: The defendant is not eligible for probation under the guidelines as the offenses of conviction expressly preclude probation. 5B1.1(b)(2).

## **PART D. OFFENDER CHARACTERISTICS**

### Family Ties, Family Responsibilities, and Community Ties

44. The defendant, Kenneth Eugene Bousley, was born on October 24, 1951, in Minneapolis, Minnesota. He is one of three children born to the union of Fred and Elaine (nee Stanek) Bousley. The defendant's parents separated shortly after his birth; hence, the defendant reports never establishing a relationship with his father. Defendant indicates that he was basically raised by his grandmother. Ken Bousley states that he shares a close relationship with his mother and two sisters. The defendant is a life-long resident of the Twin Cities area.
45. In 1973, the defendant married Deborah Jacobson in Minneapolis, Minnesota. The couple divorced in 1974.
46. In 1980, the defendant married Paula McMeillien in Minneapolis, Minnesota. Divorce proceedings were initiated in 1982; however, defendant indicates that the divorce was never finalized.
47. For the past three years, defendant has been involved in a relationship with Jessica Sharkey. One child was born from this relationship: Sandra

Bousley, date of birth January 15, 1989. In addition, Jessica Sharkey has one child from a previous marriage: Clay Sharkey, date of birth November 30, 1982. The defendant indicates that his relationship with Ms. Sharkey has become strained recently due to his legal problems.

### Mental and Emotional Health

48. Defendant states that he is in stable mental and emotional health and has never sought out the services of a professional in the mental health field. Mr. Bousley indicates that he and Jessica Sharkey discussed the need for family counseling in order to deal with behavioral problems they are encountering with Clay Sharkey. Apparently, the problem centers around lack of parental involvement by Clay Sharkey's natural father.

### Physical Condition, Including Drug Dependence and Alcohol Abuse

49. Defendant stands 5'9" tall, weighs 180 pounds, has blue eyes and brown hair. Within the last ten years, the defendant has been involved in at least three motorcycle and car accidents resulting in a partial amputation of his right leg, back injuries, as well as damage to his jaw. Current medical problems include arthritis in the spine, the need for a better fitting leg prosthesis, as well as the need for dental work/surgery as the result of his jaw injury.
50. The defendant admits experimenting with cocaine and LSD during the late 1970s. Within the last two years, he admits to snorting methamphetamine with daily use reported at the time of his arrest. The defendant participated in court-ordered chemical dependency treatment as a result of his March 26, 1979 conviction for Theft Over \$2500.

### Education and Vocational Skills

51. Educational transcripts received from Minnetonka High School indicate that the defendant withdrew from the eleventh grade on November 29, 1967. Records indicate average to below average achievement.

### Employment

52. For the last ten years, Ken Bousley reports that he has been self-employed doing repair work on houses, cars, and motor cycles, in addition to auto body work. Average monthly earnings reported are between \$400 to \$500.
53. Between 1974 and 1979, defendant reports being employed as a truck driver for U.D. Contracting of Minneapolis, Minnesota.

### Military

54. In 1970, defendant entered the Marine Corps and served for three months. Mr. Bousley indicates he received a general discharge in 1971 with his highest rank held being Private. (Verification pending.)

## **PART E. FINES AND RESTITUTION**

### Statutory Provisions

55. The maximum fine on Count I is \$4,000,000. 21 USC 841(b)(1)(A). The maximum fine on Count II is \$250,000. 18 USC 3571(b)(3).
56. A special assessment of \$50 per count is mandatory (\$100 total). 18 USC 3013.

### Guideline Provisions

57. The fine range for the instant offense is \$15,000 to \$4,000,000. 5E4.2(C)(3) and 5E4.2(c)(4)(A).

58. Subject to the defendant's ability to pay, the Court shall impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. 5E4.2(i). The most recent advisory from the Administrative Office of the U.S. Courts dated April 30, 1990, suggests that a monthly cost of \$1,415.56 be used for imprisonment and a monthly cost of \$96.66 for supervision.

### Defendant's Ability to Pay

59. The following information was obtained by interviewing the defendant. Items marked with an asterisk represent the defendant's half of assets or obligations shared jointly with his girlfriend, Jessica Sharkey.

### Assets

Residence*	\$ 8,000
1978 Lincoln Mark V*	400
Personal property*	<u>600</u>
Total Assets	\$ 9,000

### Debts

None	\$ -0-
Net Worth	\$ 9,000

### Monthly Cash Flow

Income - defendant unemployed	\$ -0-
Girlfriend's income	850
Total Income	\$ 850

### Necessary Living Expenses

Home mortgage	\$ 336
Electric	55
Heating oil/gas	40

Water/sewer	20
Telephone	24
Groceries, supplies	200
Auto insurance	25
Life insurance	27
Transportation	30
Clothing	20
CD payment	<u>125</u>
Total Necessary	
Living Expenses	\$ 902
Net Monthly Cash Flow	-\$ 52

60. Based on the defendant's financial statement and current unemployment, it appears he would be unable to pay a fine.

#### PART F. FACTORS THAT MAY WARRANT DEPARTURE

61. None.

#### PART G. IMPACT OF THE PLEA AGREEMENT

62. On June 15, 1990, Kenneth Eugene Bousley entered pleas of guilty to Counts I and II of the Indictment charging him with Possession With Intent to Distribute Methamphetamine in violation of 21 USC 841(a)(1) and Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 USC 924(c). Count I carries a mandatory minimum statutory penalty of ten years imprisonment. Count II requires a mandatory statutory penalty of five years imprisonment to be served consecutive to any other sentence imposed. There is no limit on the term of imprisonment that the Court may impose, and the defendant agrees to be sentenced in accordance with the applicable sentencing guidelines. The defendant

understands that a mandatory minimum penalty of ten years applies to the drug offense in the event that the Court finds that the relevant conduct exceeds one hundred grams of methamphetamine. There is no agreement as to the fine, term of supervised release, or costs. The defendant also agrees to pay the \$50 special assessment required per count (\$100 total).

63. Under sentencing guideline computations established by this officer, a period of imprisonment of 120 months could be imposed.

Respectfully submitted,

/s/ Julie M. Belt  
Julie M. Belt  
U.S. Probation Officer

Approved: /s/ Illegible  
Glenn Baskfield  
Chief U.S. Probation Officer

JMB/np

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## EXHIBIT B

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

-----X	:	
United States of America,	:	4-90 Crim. 57
Plaintiff,	:	
-vs-	:	
Kenneth Eugene Bousley,	:	Minneapolis, Minnesota
	:	September 26, 1990
Defendant.	:	8:30 o'clock a.m.
-----X	:	

EVIDENTIARY HEARING

BEFORE THE HONORABLE DIANA E. MURPHY,  
UNITED STATES DISTRICT JUDGE

## APPEARANCES:

For the Plaintiff:	Jeffrey S. Paulsen, Assistant U. S. Attorney
For the Defendant:	Mark W. Peterson

Court Reporter:	Edith M. Kitto 552 U. S. Courthouse Minneapolis, Minnesota
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PROCEEDINGS

[p. 2] MR. PAULSEN: Jeff Paulsen on behalf of the United States. The matter on the calendar is United States versus Kenneth Bousley.

The matter is on for an evidentiary hearing regarding sentencing factors. It's Mr. Peterson's motion. Perhaps I'll defer to him at this point.

THE COURT: Mr. Peterson?

MR. PETERSON: Your Honor, as I'm sure the Court is aware from the various pleadings which have been filed, the issue here this morning is as to the relevant conduct of the defendant, and we are prepared to offer his testimony in that regard.

THE COURT: Okay. And the testimony is going to be about the amount of drugs that should be included in the calculation?

MR. PETERSON: Well, I think the amount that should be included in the calculation is probably a legal issue that this Court is going to have to decide relative to what legally is included in relevant conduct.

The hearing this morning really goes to the factual basis for that determination by the Probation Officer, which is based in part upon statements that the Government claims Mr. Bousley made to interviewing agents and which he says he did not make.

[p. 3] THE COURT: Okay. Just to understand what the parameters of the hearing are going to be, I understand that it relates to the amount of drugs. Is there

one of the firearms that's involved - is there a factual record that needs to be developed on that?

MR. PETERSON: I don't believe so. The firearms which were found in the garage are tied up with the methamphetamine which was found in the garage. Mr. Bousley disclaims any knowledge as to the firearms in the garage, but they are not a separate issue in terms of any sentencing computations that have to be made.

THE COURT: Okay. Go ahead, then.

MR. PETERSON: Call Mr. Bousley.

KENNETH BOUSLEY,

called as a witness by the Defendant, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. PETERSON:

Q. Mr. Bousley, would you state your full name and home address for the record, please?

A. Kenneth Eugene Bousley; 5239 Humboldt Avenue North; Minneapolis, Minnesota.

Q. And you are the defendant in this action?

A. Yes.

Q. And you understand that you have pled guilty to two [p. 4] offenses, possession with intent to distribute methamphetamine and possession of a firearm during a drug trafficking crime, is that correct?

A. Yes.

Q. And you're also aware that those guilty pleas relate specifically to charges brought against you as a result of activity taking place on March 19th of this year, is that correct?

A. Yes.

Q. And you also understand that the sentencing issues which are involved in this case involve the history of your being involved in methamphetamine use and purchasing, is that correct?

A. You mean my prior? - I thought it was for March 19th.

Q. Well, that's what you're charged with. But you understand that there's an issue as to whether all conduct which has been made a subject of factual dispute in this case is involved or just your conduct on March 19th?

A. I thought it was just my conduct on March 19th.

Q. Okay. My question is whether you understand that there is an issue as to whether all of your conduct, or only your conduct on March 19th can be considered here. I'm just asking if you understand there's a question about it.

A. I understand it.

Q. When did you first become involved in purchasing [p. 5] methamphetamine?

A. Right around September of '88.

Q. And you continued to purchase methamphetamine up until the time of your arrest on March 19, 1990, is that correct?

A. Yes.

Q. How many sources of methamphetamine did you have during that time?

A. One.

Q. And did you ever make any purchases of methamphetamine from any other source during that time?

A. No.

Q. Approximately how many purchases did you make from 1988 up until March 19th of 1990?

A. Around 30.

Q. And where generally did those purchases take place?

A. In my garage.

Q. Any other place?

A. No.

Q. What size purchases of methamphetamine for yourself did you usually make?

A. For myself, two ounces.

Q. That was the size that you had normally made?

A. Normally? One ounce.

Q. And what's the largest amount of methamphetamine that you ever purchased for yourself?

[p. 6] A. Two ounces.

Q. As I understand the facts involved in this case, your source on various occasions would deliver larger amounts of methamphetamine to your garage that you actually purchased for your own use, is that correct?

A. Yes.

Q. What size did your source usually deliver on those occasions?

A. Just over four ounces.

Q. And approximately on how many occasions were just over four ounces delivered to your garage?

A. Around six times.

Q. And if you usually purchased one ounce, what happened to the other amounts that were delivered by your source?

A. He would pick them up again.

Q. Pardon me?

A. He would pick them up and take them.

Q. When would he normally pick them up?

A. Usually the same day.

Q. What is the largest amount of methamphetamine that your source delivered to your garage?

A. I'm not sure. I believe it was around twelve ounces.

Q. And when did that occur?



A. I weighed that up on the 18th of March.

Q. Of this year?

[p. 7] A. Yes.

Q. And you weighed up twelve ounces?

A. I weighed up eight ounces for my source and one ounce in half-ounce quantities for myself.

Q. I'm sorry. State that again.

A. I weighed up eight ounces for my source and then a one-ounce quantity, but they were in two bags, a half-ounce each.

Q. So that would be a total of nine ounces?

A. Yes.

Q. What happened to the other three ounces?

A. I put that back in the bag with the other eight ounces.

Q. The other eight ounces that were for your source?

A. Right.

Q. And what did you do with the two half-ounces that you had weighed up for yourself?

A. I put them in the coffee can above the workbench.

Q. Coffee can of what workbench?

A. Above the workbench in my garage.

Q. And was that the methamphetamine, or part of the methamphetamine, which was seized by police officers the next day?

A. Yes.

Q. Was the March 18th delivery of approximately twelve ounces the only time that an amount larger than approximately[p. 8] four ounces of methamphetamine was delivered?

A. Yes.

Q. Was there any occasion on which you had more than two ounces for your own use, either for personal use or for sale?

A. If there was, it would be a gram or so, just maybe a gram left over from previous. That was it.

Q. Now, you're aware that two briefcases were seized from your garage as a result of the search on March 19th, and those briefcases contained both a large amount of methamphetamine as well as some firearms, is that correct?

A. Yes.

Q. Were you aware of the presence of either one of those briefcases in your garage on March 19?

A. March 19th, I wasn't sure. I had seen one there before.

Q. Well, I'm talking about March 19th. Were you aware of the presence of either one of the two briefcases on March 19th?

A. No, I wasn't fully aware. I've seen it there before, but I didn't know if it was there on the 19th or not.

Q. You had seen one or both of them there before?

A. One.

Q. And which one had you seen there before?

A. I don't know what the brand is. It's a small, narrow, brown briefcase.

Q. What color was it?

[p. 9] A. Brown.

Q. Any other identifying characteristics?

A. Not really.

Q. And when had you last seen that briefcase in your garage?

A. I think it was September or October.

Q. Of 1989?

A. Of '89.

Q. Besides the methamphetamine which was contained in the coffee can in the garage, were you aware of any other methamphetamine or any other firearms in your garage on March 19th?

A. No.

Q. Now, on March 19th, methamphetamine was found both in the garage and in your bedroom, is that correct?

A. Yes.

Q. Would you tell the Court specifically what methamphetamine, first of all, belonged to you on that date?

A. What I had personally, that weighed out to be 6.9 grams that was in my bedroom. And there was 33 grams in a coffee can above the workbench in the garage.

Q. And all that methamphetamine was yours?

A. Yes.

Q. Were you aware of any other methamphetamine present either in your house or in the garage on March 19th?

A. No.

[p. 10] Q. Some guns were also seized both from the garage and from your bedroom. Will you tell us what guns belonged to you personally that were seized on March 19th?

A. I had a Walther-PPK .380 that was in the bedroom of the house, and I had a .22 four-shot Derringer that was also in the bedroom of the house.

Q. Did you possess any other firearms on that date?

A. No.

Q. Were you aware of any other firearms at your residence or in the garage on that date?

A. No.

Q. Now, subsequent to your arrest, you were interviewed both by police officers from the Brooklyn Park

Police Department as well as agents of the FBI, is that correct?

A. Yes.

Q. Do you recall when those interviews took place and what your location was?

A. I was interviewed in Brooklyn Park the night of the 19th, at Brooklyn Park.

Q. How about by the FBI?

A. Tuesday, the 20th, and Wednesday, the 21st. Tuesday, the 20th, was at Brooklyn Park, and the 21st was at the Federal Building here.

Q. And do you recall who you spoke to when you met with the FBI at the Federal Building?

[p. 11] A. It was Agent Mike Kelly.

Q. And who did you talk to from the Brooklyn Park Police Department?

A. Officer Genrud, I believe his name is.

Q. Gindra?

A. Gindra.

Q. Any other officers that you talked to?

A. There was a Larson that was with Mr. Kelly, and there was a Mr. Preston who was with Gindra.

Q. When you spoke to these law enforcement agents, did you ever tell them that your source had been delivering pounds of methamphetamine to you?

A. No.

Q. Did you, in fact, ever receive pounds of methamphetamine from your source?

A. No.

Q. And what, again, is the largest amount of methamphetamine that was ever present at your garage, at least to your knowledge?

A. I believe it was twelve ounces.

Q. And that was the amount delivered on the 18th of March?

A. On the 18th.

MR. PETERSON: I have no further questions.

THE COURT: Mr. Paulsen?

[p. 12] BY MR. PAULSEN:

Q. Mr. Bousley, so the Court understands, what you were doing with this methamphetamine that your source brought over was weighing it out into distribution quantities for your source, correct?

A. I was weighing it from a four-ounce bag into one-ounce bags.

Q. In other words, your source, Pat Matter, would bring over larger quantities in bulk, and you would weigh them out into one-ounce amounts so they could be distributed, correct?

A. I would weigh out into one-ounce bags, right.

Q. And you knew that Mr. Matter was going to resell this to other people, correct?



A. Probably.

Q. You were helping Mr. Matter to resell this methamphetamine by weighing it up into one-ounce quantities for him, correct?

A. I wasn't helping him. I mean, I wasn't selling it for him, no.

Q. I understand you weren't selling it for him. But he asked you to weigh it up for him in your garage, correct?

A. Yes.

Q. And the reason he wanted you to do that is so that he could have one-ounce bags that were already weighed up that he [p. 13] could sell to other people, correct?

A. What he did with it I don't know.

Q. Well, you didn't have any doubt in your mind he was going to distribute that to other people, did you?

A. Probably, yes.

Q. And that's what you pled guilty to, as a matter of fact, was possession with the intent to distribute methamphetamine?

A. I pled guilty to my distribution of it.

Q. All right. And as a payment for doing this, you would be allowed to keep some of the methamphetamine from the bulk quantities that you weighed up, right?

A. If there was any, you know, small amount left over, like under an ounce, I would keep that. But all the

ounces and stuff that I bought, you know, I paid for that. I was never given an ounce or nothing like that for payment, no.

Q. Now, you're aware that on the day you were arrested, the police found two briefcases in your garage, correct?

A. Yes.

Q. And in one of the briefcases was two pounds of methamphetamine, correct?

A. That's what they said, yes.

Q. And in the other briefcase was five pounds of methamphetamine, correct?

A. That's what I was told, yes.

Q. All right. Let's take for a moment the briefcase [p. 14] containing the two pounds of methamphetamine. I believe you testified that the last time you ever saw that briefcase was in September or October of 1989?

A. Yes, I believe so.

Q. Is it your testimony that you did not know that briefcase was in your garage on the day you were arrested?

A. I didn't look to see if it was there or not, you know. It could have been there, and it could have been gone.

Q. Well, how about the day before you were arrested?

A. I didn't see it then. I didn't look.

Q. I'm going to show you what's been marked for identification as Government's Exhibit 1. Take a look at that and see if you recognize it.

A. Yes.

Q. That's a statement you gave to Detective Gindra and Detective Preston of the Brooklyn Park Police Department on the day you were arrested?

A. Yes.

Q. It's a 21-page statement. At the end of it, you've signed it, saying that "I, the undersigned, have received a copy of this 21-page statement and find it to be true and correct as I have given it." That's your signature on page 21, correct?

A. Yes.

Q. And, in fact, you did read through that statement prior [p. 15] to signing it, and you made some corrections, which are indicated with your initials?

A. Yes.

Q. All right. So it was a true and correct statement that you gave to the officers, correct?

A. Yes.

Q. I'd like you to look at page 13 of the statement, about the middle of the page.

MR. PAULSEN: Your Honor, I have an extra copy for the Court.

(Document handed to the Court.)

BY MR. PAULSEN:

Q. Do you see right underneath where it says "Tape 2, Side 1," there's a question by Detective Preston. And he's telling you about what they found out in the garage, and he says, "All right. There is a couple that look like a pound, but there were five-pound baggies in one of the briefcases. There was a pound baggie, and then there was a sandwich type bag in another briefcase. This is where you took the eight ounces from?" And your answer was, "Yeah, I used the sandwich bags."

A. Yeah, I took it from a sandwich bag. I didn't take it from the briefcase; I took it from the sandwich bag.

Q. Well, it says here - it goes on to say, "You used the sandwich bag you took it out from, so obviously you knew what was inside the briefcase?" And your answer was, "I knew [p. 16] what - that there was some. I didn't think there was what you said, seven pounds or whatever." Do you remember saying that?

A. I believe I said it, yes.

Q. All right. And then you go on to say that you didn't know anything about the five pounds in the other briefcase. You said, "I didn't know nothing about that, no."

A. I didn't know anything about seven pounds or five pounds or -

Q. Well, it does seem that what you told the police was that the eight ounces that you scaled up the day before you were arrested came from that briefcase containing two pounds of methamphetamine.

A. No. It came from a bag that was underneath the workbench. And that's stated on the top of the page.

Q. Where are you referring me to? There's a question at the top of the page, the second question, "You weighed these ounces from the meth that was in one of the briefcases?"

Answer: "There was a bigger bag in there, yeah."

And then it says, "So you weighed those eight ounces from - what did you do with eight ounces? Did you sell them?" Your answer is "No." And then you go on to say, "I left them underneath the woodbench."

Question: "You left them underneath the woodbench?"

Answer: "He might have put some in that briefcase with, [p. 17] you know."

So you clearly knew about that briefcase the day before you were arrested, didn't you?

A. No, I didn't.

Q. And then you were asked some questions about a statement you gave a few days later to Agent Mike Kelly of the FBI. I'll ask you whether or not you made these statements to Agent Kelly.

The first statement: "During December of 1989, Pat Matter began delivering one-pound quantities of methamphetamine to him, Mr. Bousley, at his residence." Do you recall making that statement?

A. No.

Q. Second statement: "According to Bousley, Pat Matter would instruct him to weigh out ounce quantities from the pound." Do you recall making that statement?

A. No.

Q. Do you recall making the statement, "If Pat Matter were present, he would assist him, Bousley, in weighing out ounce quantities of methamphetamine"?

A. No.

Q. The next statement, "If Matter could not stay, he would leave the pound quantities of methamphetamine in the garage and instruct Bousley on what amounts to weigh out from each pound." Do you recall making that statement?

[p. 18] A. No.

MR. PAULSEN: I have no further questions, Your Honor.

MR. PETERSON: I have nothing further.

THE COURT: Okay. You may step down, Mr. Bousley.

(Witness excused)

MR. PETERSON: We have no further witnesses, Your Honor.

MR. PAULSEN: The Government would call Special Agent Mike Kelly of the FBI.

Before I begin, Your Honor, I'd like to offer Government's Exhibit 1 for the court record.



MR. PETERSON: No objection.

THE COURT: Does that have both of the statements in it that you were asking Mr. Bousley about?

MR. PAULSEN: The only statement that was transcribed is the one given to the Brooklyn Park police.

THE COURT: Exhibit 1 is received.

(Government's Exhibit 1 received in evidence)

[p. 19] MICHAEL KELLY

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

#### DIRECT EXAMINATION

BY MR. PAULSEN:

Q. Special Agent Kelly, how are you employed?

A. I'm employed as a special agent with the Federal Bureau of Investigation, assigned to the Minneapolis Division of the FBI.

Q. And how long have you been so employed?

A. Since December 1st of 1985.

Q. You're the case agent in the matter of the United States of America versus Kenneth Eugene Bousley?

A. I am.

Q. Did you have an occasion to interview Mr. Bousley on March 21, 1990?

A. I did.

Q. So that was two days after his arrest?

A. That's correct.

Q. And did you begin the interview by giving him his Miranda warning, and so forth?

A. I did, yes.

Q. In fact, he signed a written waiver of his Miranda rights, is that correct?

A. He did, as witnessed by Sergeant Larson of the FBI [p. 20] Minneapolis Task Force.

Q. And during this interview, did he appear to be under the influence of any drugs or alcoholic beverages?

A. No, he did not.

Q. Did he respond to your questions appropriately?

A. He did.

Q. Did you have a conversation with Mr. Bousley during this interview concerning deliveries of methamphetamine to Mr. Bousley's residence?

A. Yes.

Q. And what did Mr. Bousley tell you about that?

A. Mr. Bousley gave me an extensive statement during the interview concerning his narcotic activities with one Patrick Joseph Matter, who was known to me.

Q. He's the president of the Hell's Angels, isn't that right?

A. Yes, he's the president of the local chapter of the Hell's Angels motorcycle gang.

Q. And what did Mr. Bousley tell you about his dealings with Pat Matter?

A. Specifically, he told me about his narcotic dealings with Pat Matter from July of 1988 through March, until the time of his arrest, of 1990. He specifically identified Mr. Matter as his source and particularly identified Mr. Matter as an individual who has supplied him with multi-pound quantities of [p. 21] methamphetamine at Mr. Bousley's residence on numerous occasions.

Q. I show you a copy of your report, and see if that refreshes your recollection as to the exact time period Mr. Bousley was talking about with regard to these deliveries of pounds of methamphetamine.

A. Yes. Mr. Bousley advised me that the pounds started in approximately December of 1989 and continued up until the time of his arrest in March of 1990.

Q. Did he indicate how many pounds total were delivered?

A. I'd have to add them up. I don't recall.

THE COURT: December of what year, did you say?

THE WITNESS: December of 1989 through March of 1990.

A. I would say somewhere in the vicinity of approximately seven to ten pounds prior to his arrest.

MR. PAULSEN: I have no further questions.

THE COURT: Mr. Peterson?

## CROSS-EXAMINATION

BY MR. PETERSON:

Q. Agent Kelly, did you take notes when you were interviewing Mr. Bousley?

A. I did.

Q. Are they present?

[p. 22] A. No, they're not.

Q. Are they still in existence?

A. They are.

Q. Did you review them prior to testifying here today?

A. No, sir.

Q. Would it take long to get them up here?

A. No, sir, it wouldn't take long.

MR. PETERSON: Your Honor, could we have a brief recess for that purpose?

THE COURT: All right. We'll be in recess for a minute, then.

(Recess taken)

MR. PETERSON: Thank you, Your Honor. Agent Kelly has produced his notes, and I have reviewed them.

BY MR. PETERSON:

Q. Agent Kelly, am I also correct that you've reviewed your notes and reports, and it would be your

testimony that Mr. Bousley told you about a total of six pounds of methamphetamine alleged to have been delivered in December of 1989, January of 1990 and February of 1990?

A. That's correct.

THE COURT: Well, just a minute. I'm not quite sure I understand that question. It's a total of six pounds over the three months?

[p. 23] THE WITNESS: Your Honor, I had previously estimated, as I said in my testimony, that it was approximately seven to eight pounds. Mr. Peterson is correcting me that it was only six pounds, through my report. That is accurate.

THE COURT: Okay, thank you.

THE WITNESS: Yes, Ma'am.

BY MR. PETERSON:

Q. Now, you also spoke to Mr. Bousley about his activities on March 19, 1990, is that correct?

A. Yes.

Q. And he told you that in accordance with instructions from his source, he was to weigh out eight ounces of methamphetamine, correct?

A. That is correct.

Q. And he told you that he did so and placed that eight ounces of methamphetamine in a grocery bag beneath the workbench in the garage?

A. Yes.

Q. And he also told you that he weighed out an ounce of methamphetamine for himself and put that ounce and another ounce in a coffee can in the garage, is that correct?

A. Yes.

Q. He also advised you that he had no knowledge of the seven pounds of methamphetamine which was seized from the two [p. 24] briefcases?

A. That's what he advised me on March 21st, yes, sir.

Q. And he also told you that he had no knowledge of the firearms which were found within the briefcases, is that correct?

A. That's correct.

MR. PETERSON: I have no further questions.

THE COURT: Mr. Paulsen?

#### REDIRECT EXAMINATION

BY MR. PAULSEN:

Q. Just so the record is clear, when you reviewed your handwritten notes, did you find them to be consistent with your typewritten report?

A. Yes. Thoroughly accurate, yes, sir.

MR. PAULSEN: I have nothing further.

MR. PETERSON: Nothing further.

THE COURT: Thank you, Agent Kelly.



(Witness excused)

MR. PAULSEN: The Government would rest.

THE COURT: Do you have any other testimony, Mr. Peterson?

MR. PETERSON: No, Your Honor.

THE COURT: Okay. Do either counsel want to make an [p. 25] argument based upon the evidence that was produced this morning?

MR. PETERSON: No, Your Honor. I'd submit it on the record.

THE COURT: Mr. Paulsen?

MR. PAULSEN: Just briefly, Your Honor. The government's position, as we set forth in our papers, is that he could fairly be held accountable for all seven pounds. And in support of that, I want to refer the Court to some cases.

I just got the Sentencing Commission's case law update the other day, and there are three cases. Maybe I can give the cites to your clerk after the hearing. But the test is whether the drugs are part of the same common scheme or plan.

THE COURT: Maybe you could just mention the citations without the names so Mr. Peterson hears them, too.

MR. PAULSEN: Sure. 900 F.2d 131 is an Eighth Circuit case; 893 F.2d 947, Eighth Circuit; and then there's a Ninth Circuit case that covers a lot of different circuits, reviewing the law, and that's 903 F.2d 648.

But the test is whether the drugs are part of the same common scheme or plan. They don't even have to be charged in the indictment. You can go beyond the indictment when you figure out the base offense level.

Here, the common scheme or plan was for Mr. Bousley [p. 26] to weigh up ounce quantities for his source, Pat Matter, who would then pick them up after they were packaged into distribution quantities and go sell them. That's the common scheme or plan that was going on from at least December of '89 up until the date of his arrest.

And at various times pounds at a time were delivered to the garage, where they were stored. Apparently they were stored in these briefcases.

Now, Mr. Bousley claims that he didn't know that the five pounds were in one of the briefcases. But two pounds was found in the other briefcase, and I think the record fairly shows, when you read this statement that he admits was truthful in its entirety and in context, it shows that on the day before his arrest, he took methamphetamine out of the one briefcase that was later found to contain two pounds, he weighed it up, put it under the workbench, and then at some point it got back into that briefcase - how, exactly, we don't know.

But he knew about that briefcase. He knew what it contained. And he should be held accountable at least for the two pounds in that briefcase.

That's what the Probation Office is recommending, two-pound accountability. And even though we believe he could be held accountable for the seven pounds, we'll

go along with the Probation Office because of the ten-year mandatory minimum [p. 27] that applies the minute you find that he's involved with more the 100 grams of methamphetamine.

One-hundred grams is the threshold for a ten-year mandatory minimum. Anything above 100 grams, the exact amount is largely irrelevant.

But we would suggest that you adopt the Probation Officer's finding of the two-pound amount. That's all I have.

THE COURT: Did you want to make a reply, Mr. Peterson?

MR. PETERSON: No, Your Honor.

THE COURT: Okay, thank you. I'll go back over the testimony and the record and issue written findings fairly soon, and we'll schedule the sentencing then.

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Certified: /s/ Edith M. Kitts  
Official Court Reporter

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Crim. 4-90-57

United States of America,      FINDINGS OF FACT,  
Plaintiff,      CONCLUSIONS OF LAW,  
v.      AND ORDER

Kenneth Eugene Bousley,  
Defendant.

---

Jeffrey Paulsen, Esq., Assistant United States Attorney,  
District of Minnesota, appeared for the government.

Mark W. Peterson, Esq., 608 Second Ave. S., Minneapolis,  
MN 55402, appeared for defendant.

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Defendant Kenneth Eugene Bousley pleaded guilty to an indictment charging him in Count I with Possession With Intent to Distribute Methamphetamine, 21 U.S.C. § 841(a)(1), and in Count II with Use of Firearms During and in Relation to a Drug Trafficking Crime, 18 U.S.C. § 924(c). A Presentence Report was prepared and presented to the parties. Defendant requested an evidentiary hearing regarding disputed facts in the Report. Testifying at this hearing were Kenneth Bousley, defendant, and Special Agent Michael Kelly of the FBI. Also admitted into evidence at this hearing was the signed statement of Kenneth Bousley to Detectives Jindra and Preston of the Brooklyn Park Police Department on the day of his arrest, March 19, 1990.

### FINDINGS OF FACT

Based on the evidence produced at the hearing and the court's evaluation of the testimony of the witnesses, the court makes the following findings of fact:

1. Kenneth Bousley received deliveries of methamphetamine from his source in his garage between December, 1989 and March 19, 1990, totalling approximately six pounds.

2. Bousley had seen at least one briefcase in his garage during this period, and knew that it contained methamphetamine. He regularly weighed out small quantities of methamphetamine for his source from the larger deliveries. His source picked up the quantities Bousley had weighed out for distribution. Bousley kept small amounts of stray methamohetamine left over from the weighing and packaging for himself.

3. In his statement to Detectives Jindra and Preston, Bousley stated that he knew about one briefcase in his garage, which was found to contain about two pounds of methamphetamine, and that he weighed out smaller quantities from the methamphetamine stored in this briefcase. In direct testimony before the court, Bousley stated that he was "not fully aware" of the briefcases on the day he was arrested, but he had previously seen one briefcase in his garage which he described as small, narrow and brown. This was the briefcase which was found to contain two pounds of methamphetamine.

4. Bousley testified that his signed statement to Detectives Jindra and Preston was a true and correct statement. Bousley denied certain facts which Special

Agent Kelly testified Bousley had told him two days after arrest, but Bousley's testimony concerning these specific facts was equivocal.

5. Bousley knew there was regularly methamphetamine in at least one of the briefcases in the garage. It was reasonably foreseeable to him that at least one of the briefcases found in his garage at the time of his arrest would contain methamphetamine in quantities of one pound or more.

6. Approximately 907 grams of methamphetamine were in the small, narrow, brown briefcase in Bousley's garage at the time of his arrest, 33 grams were in the coffee can over the workbench in his garage, and 6.9 grams were in a bag in his bedroom. The court finds that all of these 946.9 grams of methamphetamine were part of a common scheme or plan between Bousley and Bousley's source to distribute methamohetamine.

### CONCLUSIONS OF LAW

Based on the foregoing findings of fact, the court makes the following conclusions of law:

1. That as relevant conduct the defendant is accountable for the 946.9 grams of methamphetamine which were found in one of two briefcases in his garage, in a coffee can in his garage, and in his bedroom, at the time of his arrest. *See United States v. Sleet*, 893 F.2d 947 (8th Cir. 1990).

2. The defendant aided and abetted the distribution of methamphetamine by weighing it up for his source on



numerous occasions as part of a common scheme or plan.  
*See id.*

### ORDER

These findings of fact and conclusions of law shall be part of the basis for the court's determination of the defendant's sentence.

Dated: September 28, 1990

/s/ Diana E. Murphy  
 Diana E. Murphy  
 United States District Judge

### UNITED STATES DISTRICT COURT

\_\_\_\_\_ District of \_\_\_\_\_ Minnesota \_\_\_\_\_

UNITED STATES  
 OF AMERICA

V.

Kenneth Eugene Bousley

(Name of Defendant)

JUDGMENT IN A  
 CRIMINAL CASE

(For Offenses Committed

On or After

November 1, 1987)

Case Number:

4-90-57

Mark W. Peterson

Defendant's Attorney

### THE DEFENDANT:

[X] pleaded guilty to count(s) 1 and 2.  
 [ ] was found guilty on count(s) \_\_\_\_\_  
 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number(s)</u>
21 841(a)(1)	Poss. w/intnt to distribute meth- amphetamine.		1
18 924(c)	Use of Firearms during & in rel. to a drug trafficking crime.		2

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s) \_\_\_\_\_
- ☐ Count(s) \_\_\_\_\_ (is)(are) dismissed on the motion of the United States.
- ☐ It is ordered that the defendant shall pay a special assessment of \$100. for count(s) 1 & 2, which shall be due ☒ immediately ☐ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: <u>469-64-0492</u>	<u>November 2, 1990</u> Date of Imposition of Sentence
Defendant's Date of Birth: <u>10/24/51</u>	<u>/s/ Illegible</u> Signature of Judicial Officer
Defendant's Mailing Address: <u>5320 Humboldt Ave. No. Minneapolis, MN 55444</u>	<u>Diana E. Murphy, U.S. District Judge</u> Name & Title of Judicial Officer
Defendant's Residence Address: <u>Same as above</u>	<u>November 2, 1990</u> Date

### IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 78 months on count 1. On Count 2, the defendant is hereby committed. to the custody of the Bureau of Prisons to be imprisoned for a term of 60 months, to be served consecutively to the term imposed for count 1.

- ☒ The court makes the following recommendations to the Bureau of Prisons:

That the Federal Prison Camp in Duluth, MN be designated as the defendant's place of confinement.

- ☐ The defendant is remanded to the custody of the United States Marshal.
- ☒ The defendant shall surrender to the United States Marshal for this district,
- ☒ at 9:00 a.m./p.m. on Dec. 14, 1990.
- ☐ as notified by the Marshal.
- ☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.
- ☒ before 2 p.m. on Dec. 14, 1990.
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation Office.

**RETURN**

I have executed this judgment as follows:

\_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_ at \_\_\_\_\_, with a certified copy of this judgment.

\_\_\_\_\_  
 United States Marshal  
 By \_\_\_\_\_  
 Deputy Marshal

**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of 4 years on Ct. 1, and 3 years on Ct. 2. Terms of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

[ ] The defendant shall report in person to the probation office in the district to which the defendant is

released within 72 hours of release from the custody of the Bureau of Prisons.

- [ ] The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.
- [X] The defendant shall not possess a firearm or destructive device.

The defendant shall submit to periodic drug testing at least every 60 days and participate in substance abuse programming at the direction of the U.S. probation Office.

**STANDARD CONDITIONS OF SUPERVISION**

While the defendant is on supervised release pursuant to this judgment the defendant shall not commit another federal state or local crime. In addition:

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;



- 6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

### STATEMENT OF REASONS

- ☐ The court adopts the factual findings and guideline application in the presentence report.

OR

- ☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary);

See attachment.

### Guideline Range Determined by the Court:

Total Offense Level: 28

Criminal History Category: 1

Imprisonment Range: 78 to 97 months on Ct. 1, 60 mos. consec., for ct. 2.

Supervised Release Range:     to     years 4 years to life.

Fine Range: \$12,500. to \$2,000,000.

- ☒ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: \$           

- ☐ Full restitutions not ordered for the following reason(s):

- ☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

- [ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

- [ ] upon motion of the government, as a result of defendant's substantial assistance.
- [ ] for the following reason(s):

#### MINUTES OF PROCEEDINGS

UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

DATE: 11-2-90 JUDGE: Murphy REPORTER: Kitto

CRIMINAL NUMBER: 4-90-57

UNITED STATES  
OF AMERICA [sic]

/s/ Jeffrey Paulsen  
Attorney for  
Government

v.

/s/ Kenneth Eguene [sic]  
Bousley

/s/ Mark W. Peterson  
Attorney for  
Defendant

#### SENTENCING

( ) It is adjudged that the defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 78 months for count 1. On Ct. 2, deft. is committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months, to be served consecutively to the sentence imposed for count 1.

It is further adjudged that on ct. 1, deft. is to serve a term of supervised release of 6 yrs. on ct. 2, the deft is to serve a term of supervised release of 3 yrs, to run concurrently with ct. 1, upon the following terms and conditions: 1. That deft. not possess any firearms or dangerous weapons. Taht [sic] deft. submit to periodic drug testing at least every 60 days and participate in substance abuse programing at the direction of the U.S. Probation Office.

- ( ) It is further adjudged that pursuant to title 18, United States Code, 3013, defendant is assessed a conviction penalty of \$100 to be paid to the United States, due immediately.
- ( ) The court finds the defendant is eligible for the voluntary surrender program. Execution of sentence is stayed until 12-14-90 at which time the defendant shall surrender to the United States Marshal in Mpls., MN at 9:00 a.m., or if the Bureau of Prisons has designated an institution to which the defendant shall report, the defendant shall arrive at the institution no later than [sic] 2:00 p.m. on that date.
- ( ) The court recommends \_\_\_\_\_
- ( ) Counts \_\_\_\_\_ dismissed on the motion of the U.S. Attorney.

/s/ Mary Kaye Conery  
Deputy Clerk



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

Crim. No. 4-90-57

United States of America,  
Plaintiff,

v.

Kenneth Eugene Bousley  
Defendant.

SENTENCING  
MEMORANDUM

**I. FINDINGS OF FACT**

The court adopts the factual statements contained in the presentence investigation report (PSI) as to which there are no objections. A dispute has arisen with respect to the factual statements contained in paragraphs 8-9, 13-15, and 26-28 of the PSI, concerning the quantity of methamphetamine for which the defendant is accountable. This dispute was the subject of an evidentiary hearing held September 26, 1990. On September 28, 1990, based on this hearing, the court entered findings of fact which are hereby incorporated and attached to this memorandum.

**II. APPLICATION OF GUIDELINES TO FACTS:**

The court adopts the conclusions as to the applicable guidelines contained in the PSI to which there are no objections. A dispute was raised with respect to the conclusions contained in paragraphs 29, 35 and 45 of the PSI. This dispute is resolved by the

conclusions of law reached on the basis of the evidentiary hearing, which the court entered on September 28, 1990, and are hereby incorporated and attached to this memorandum.

Both parties agree in objecting to the application of the guidelines to the facts in the PSI. The PSI states that Count I falls under the ten year mandatory minimum sentence of 18 U.S.C. § 841(b)(1)(A)(viii), for more than 100 grams of a mixture containing methamphetamine. The government argues that this was a typographical error in the United States Code, which should have read "1000 grams" instead of "100 grams" in this subsection; it points to the legislative history, the overall statutory scheme, and the relation between this scheme and the sentencing guidelines to support this position. The defendant agrees, and also argues that the defendant's amount of methamphetamine (946.9 grams) actually fits under two separate mandatory minimum sentence provisions - both a ten year mandatory minimum sentence, § 841(b)(1)(A)(viii), and a five year mandatory minimum sentence, § 841(b)(1)(B)(viii). The defendant argues that under the rule of lenity, whereby conflicting or ambiguous criminal statutes are interpreted in favor of the defendant, he should be subject to the lower mandatory minimum.

The court concludes that the amount of methamphetamine for which the defendant is accountable, 946.9 grams, fits under two separate statutory mandatory minimum sentences. Under the rule of lenity, the court will apply the lesser penalty as the statutory mandatory minimum sentence.

Accordingly, the court determines that the applicable guidelines are:

Total Offense Level: 28



**Criminal History Category: I**

78 to 97 months imprisonment for Count I, and 60 months imprisonment, consecutive, for Count II

4 years to life supervised release

\$12,500 to \$2,000,000 fine (plus cost of imprisonment or supervision)

\$100 special assessment

### III. IMPOSITION OF SENTENCE AND STATEMENT OF REASONS

Kenneth Eugene Bousley, you have been charged in Count I of the indictment with knowingly and intentionally possessing with intent to distribute methamphetamine, in violation of Title 21, United States Code, section 841(a)(1), and in Count II of the indictment with knowingly and intentionally using firearms in relation to a drug trafficking crime, in violation of Title 18, United States Code, section 924(c).

Based upon your plea of guilty to that charge, it is considered and adjudged that you are guilty of that offense.

#### THEREFORE, IT IS ADJUDGED:

that on count I, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 78 months;

that on count II, you are committed to the custody of the Bureau of Prisons for imprisonment for a term of 60 months, to be served consecutively to the term imposed for count I.

#### IT IS FURTHER ADJUDGED:

that on count I, pursuant to 21 U.S.C. § 841 you are to serve a term of supervised release of 4 years, and that on count II, pursuant to 18 U.S.C. § 3583 you are to serve a term of supervised release of 3 years to run concurrently with the term of supervised release imposed for count I, upon the following terms and conditions:

1. that you not commit any crimes, federal, state, or local;
2. that you abide by the standard conditions of supervised release recommended by the Sentencing Commission;
3. that you not possess any firearms or dangerous weapons;
4. that you submit to periodic drug testing at least every 60 days and participate in substance abuse programming at the direction of the U.S. Probation Office.

that pursuant to 18 U.S.C. § 3013, you are to pay to the United States a Special Assessment of \$100, due immediately.

#### Reasons for Imposing Sentence Within Guideline Range

The court finds that the sentence of imprisonment called for by the guidelines is appropriate in this case and that there are no aggravating or mitigating circumstances not adequately considered by the Guidelines.

#### Fine

A fine is not imposed in this case because defendant is apparently unable to pay a fine due to his lack of assets and pending incarceration.

Plea Agreement

The court has accepted a plea agreement in this case because it is satisfied that the agreement adequately reflects the seriousness of the defendant's offense behavior and that accepting the plea agreement will not undermine the statutory purposes of sentencing.

Dated: 11/5/90

/s/ Diana E. Murphy  
Diana E. Murphy  
 United States District Judge

PETITION FOR WRIT OF HABEAS CORPUS  
 UNITED STATES DISTRICT COURT  
 DISTRICT OF MINNESOTA

PERSONS IN FEDERAL CUSTODY

KENNETH EUGENE BOUSLEY	)	
	)	
Full name and prisoner number of petitioner	)	Case No. <u>5-94-87</u>
04450-041	)	(To be supplied by the Clerk of the U. S. District Court)
JOSEPH M. BROOKS, WARDEN	)	
Name of Respondent	)	(Filed Jul. 05, 1994)

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the U.S. District Court, it shall be in writing (legibly handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, petitioner may finish his answer to a particular question on the reverse side of the page or on an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every petition for habeas corpus must be sworn to under oath, the false statement of a material fact

therein may serve as the basis of prosecution and conviction for perjury, Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken *in forma pauperis*, it shall include an Application To Proceed In Forma Pauperis (AO 240) setting forth information which establishes that petitioner will be unable to pay the fees and costs of the habeas corpus proceedings. When the petition is completed, *the original and one copy* shall be mailed to the Clerk of the United States District Court for the District of Minnesota, 417 Federal Building, 515 West 1st Street, Duluth, Minnesota 55802-1397

1. Place of detention FPC DULUTH, DULUTH, MINNESOTA
2. Name and location of court which imposed sentence UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA - FOURTH DIVISION
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
  - (a) CRIMINAL NUMBER 4-90-57 (SUPERSEDING INDICTMENT)
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
4. The date upon which sentence was imposed and the terms of the sentence:
  - (a) NOVEMBER 2, 1990
  - (b) COUNT I - (21 U.S.C. §841(A)(1)) - 78 MONTHS

(c) COUNT II - (18 U.S.C. §924(C) - 60 MONTHS (CONSECUTIVE))

5. Check whether a finding of guilty was made
  - (a) After a plea of guilty XXX
  - (b) After a plea of not guilty \_\_\_\_\_
  - (c) After a plea of nolo contendere \_\_\_\_\_
6. If you were found guilty after a plea of not guilty, check whether that finding was made by:
  - (a) A jury N/A
  - (b) A judge without a jury N/A
7. Did you appeal the judgment of conviction or the imposition of sentence?
 

YES
8. If you answered "yes" to (7), list:
  - (a) The name of each court to which you appealed
    - i. UNITED STATES COURT OF APPEALS - 8TH CIRCUIT (APPEALED ON COUNT I, ONLY)
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) The result in each such court to which appealed
    - i. AFFIRMED
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_



(c) The date of each such result

i. UNKNOWN

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(d) If known, citations of any written opinions or orders entered pursuant to such results.

i. UNKNOWN

ii. \_\_\_\_\_

iii. \_\_\_\_\_

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

(a) THE CONVICTION AND SENTENCE WERE IMPOSED IN CONTRAVENTION TO THE UNITED STATES CONSTITUTION AND THE LAWS OF THE UNITED STATES SINCE A FACTUAL BASIS DID NOT EXIST FOR THE GUILTY PLEA ON COUNT II, 28 U.S.C. §924(C). (SEE ATTACHED PLEADINGS.)

(b)

(c)

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) SEE ATTACHED PLEADINGS.

(b)

(c)

11. Have you filed previous petitions for habeas corpus, motions under Section 2255 of Title 28, United States code, or any other applications, Petitions or motions with respect to this conviction?

NO

12. If you answered "yes" to (11), list with respect to each petition, motion or application:

(a) The specific nature thereof:

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) The name and location of the court in which each was filed:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(c) The disposition thereof:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

12. (Continued)

(d) The date of each such disposition:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

13. If you did not file a motion under Section 2255 of Title 28, United States code, or if you filed such a motion and it was denied, state why your remedy by way of such motion is inadequate or ineffective to test the legality of your detention:

(a) N/A

(b)

(c)

14. Has any ground set forth in (9) been previously presented to this or any other federal court by way of petition for habeas corpus, motion under Section 2255 of Title 28, United States Code, or any other petition, motion or application?

NO

15. If you answered "yes" to (14), identify:

(a) Which grounds have been previously presented:

i. N/A

ii. \_\_\_\_\_

iii. \_\_\_\_\_

(b) The proceedings in which each ground was raised:

i. \_\_\_\_\_

ii. \_\_\_\_\_

iii. \_\_\_\_\_

16. Were you represented by an attorney at any time during the course of:

(a) Your appearance before a United States Commissioner? \_\_\_\_\_

(b) Your arraignment and plea? YES

(c) Your trial, if any? \_\_\_\_\_

(d) Your sentencing? YES

(e) Your appeal, if any, from the judgment of conviction or the imposition of sentence?

YES

(f) Preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

17. If you answered "yes" to one or more parts of (16), list:

(a) The name and address of each attorney who represented you:

i. MARK PETERSON  
250 NORTHSTAR EAST  
608 SECOND AVENUE SOUTH  
MINNEAPOLIS, MN 55402-1910

ii. \_\_\_\_\_

iii. \_\_\_\_\_

## 17. (Continued)

(b) The proceedings at which each such attorney represented you:

i. PLEA 6/15/9

ii. SENTENCING 11/2/90  
APPEAL OF COUNT I

iii. EVIDENCIARY HEARING 9/28/90

18. If you are seeking leave to proceed *in forma pauperis*, have you completed the sworn affidavit setting forth the required information (see instructions, page 1 of this form?) YES

/s/ Kenneth E. Bousley  
Signature of petitioner

)  
)  
)

\_\_\_\_, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

\_\_\_\_\_  
Signature of Affiant

SUBSCRIBED AND SWORN to before  
me this \_\_\_\_ day of \_\_\_\_\_,  
(month)(year)

\_\_\_\_\_  
Notary Public

My commission expires:

\_\_\_\_\_  
(Month, Day, Year)

NOTARIZATION IS NOT NECESSARY IF THE FOLLOWING STATEMENT IS COMPLETED:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 6-23-94  
(Date)

/s/ Kenneth E. Bousley  
(Signature)

\_\_\_\_\_



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION

Kenneth Eugene Bousley,	)	
Petitioner,	)	
	)	
v.	)	Case No. _____
	)	
Joseph M. Brooks,	)	
Warden, FPC Duluth,	)	
	)	
Respondent.	)	

Petition for Writ of Habeas Corpus

The petitioner, Kenneth Eugene Bousley, currently incarcerated at the Federal Prison Camp, Duluth, Minnesota, respectfully requests that this Honorable Court grants his Petition for Writ of Habeas Corpus, and pursuant to 28 U.S.C. ¶2241, and in furtherance thereof, states as follows:

Parties

1. The petitioner is currently incarcerated, serving a sentence imposed by a United States District Court, at the Federal Prison Camp, Duluth.

2. The respondent is the warden of the Federal Prison Camp, Duluth, and is named as the respondent in his official capacity only.

Jurisdiction & Venue

3. This court has jurisdiction to adjudicate this petition pursuant to 28 U.S.C. ¶2241(a) and 28 U.S.C. ¶2242.

4. Venue is proper in this court pursuant to 28 U.S.C. ¶1402(a).

Statement of Facts

5. Petitioner Kenneth Eugene Bousley ("Bousley") was indicted in the District of Minnesota. The indictment alleged *inter alia*, (1) possession with intent to distribute methamphetamine, 21 U.S.C. ¶841(a)(1); (2) use of firearms during and in relation to a drug trafficking crime, 18 U.S.C. ¶924(c). (See Presentence Report, attached as Exhibit A.)

6. On June 15, 1990, petitioner Bousley pled guilty to Counts I and II of the indictment. (See Exhibit A.)

7. Petitioner Bousley pled guilty to Count I of the indictment, and testified to support the guilty plea that he engaged in drug trafficking out of his garage. (See Exhibit B, pp. 11-13.) The garage in question is a detached garage, and is approximately fifty (50) feet from the house where the guns were found. (See Exhibit D, Application for Search Warrant & Supporting Affidavit.) As the petitioner testified at the plea, he has an artificial leg. (See Exhibit B.) With the aid of a cane, the petitioner can move about, but not quickly.

8. When petitioner Bousley entered his guilty plea to both Counts I and II, U.S. District Judge Diane E. Murphy, pursuant to F.R.Cr.P. 11(f) asked the petitioner for the factual basis for his proposed guilty plea to Count II of the indictment. The relevant portion of the allocution which resulted is as follows:

\* \* \*

THE COURT: And Count II do you know what you were charged with in that count? Can you tell me?

DEFENDANT BOUSLEY: Possession of a firearm.

THE COURT: Okay. Now, it also charges you with possessing the firearms during, in, and in relation to a drug trafficking crime, the type of crime that was referred to in Count I. Would you tell me what kind of weapons you had at the time in question?

DEFENDANT BOUSLEY: There was a .22 four-shot derringer and a PBK 380 automatic pistol.

\* \* \*

BY MR. PAULSEN [ASSISTANT U.S. ATTORNEY]:

Q. Now, with respect to these two guns you just mentioned, the 380 and the .22, those were found in your bedroom, is that right?

A. Yes.

Q. And that was near that 6.9 grams of methamphetamine that you talked about before, right?

A. Yes.

\* \* \*

Q. All right. Now, had you been doing some of the selling of the methamphetamine out of your house as opposed to out of your garage?

A. No.

Q. These guns that were found in your bedroom, how were those connected with the drug trafficking? Were those available for you to use in case something went wrong in drug trafficking?

A. No. They were there for protection -

MR. PETERSON: First of all, there's no dispute that the guns were yours, is that correct?

DEFENDANT BOUSLEY: Right.

MR. PETERSON: And, in the past, you had sold drugs from the area of your residence, is that correct?

DEFENDANT BOUSLEY: In the garage, yes.

\* \* \*

BY MR. PAULSEN:

Q. Those guns were loaded, by the way, when they were found in your bedroom, correct?

A. The .22 four-shot was.

Q. And that was found in the headboard of the bed?

A. Yes, in a tape box.

Q. So it was pretty easily accessible of [sic] you needed to get to it in a hurry?

A. Well, it was under other boxes, other video cassette boxes, and inside a video cassette box.

THE COURT: Do you understand, Mr. Bousley, if you wanted to contest whether you were guilty to Count II or not, whether those firearms were related to your drug trafficking, if you wanted to contest that,

you'd have to go to trial to do that, do you understand, but that you can do that? Do you understand that?

DEFENDANT BOUSLEY: Yes, Your Honor. But I was just saying what I meant is, they weren't right out in the open. You know, I couldn't just reach over and grab it.

\* \* \*

(See Transcript of Proceedings, Change of Plea, June 15, 1990, pp. 13-16; attached as Exhibit B.)

9. The Presentence Report indicates that the purpose of the firearm was *not* for drug trafficking, but for the protection of the defendant's girlfriend that lived in and jointly owned the house, who had been raped previously. (See Exhibit A, pg. 3, item 16.)

10. The District Court imposed sentence on November 2, 1990. Petitioner was sentenced to 78 months on Count I. On Count II, petitioner was sentenced to an additional 60 months to be served consecutively to the term of imprisonment imposed for Count I. (See Judgment In A Criminal Case, attached as Exhibit C.)

#### Legal Allegations

11. Petitioner realleges and incorporates by reference paragraphs 1 through 10 of the petition.

12. The statutory authority for this petition is 28 U.S.C. §2241, which permits a judgment of conviction of an U.S. District Court may be challenged if it is imposed in violation of the laws and/or Constitution of the United States.

13. The conviction of the petitioner violates the laws and Constitution of the United States, on the following bases:

- A. There is insufficient evidence to support the petitioner's conviction, and;
- B. The plea allocution proffered by the petitioner was insufficient, since it did not indicate and [sic] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred.

#### Conclusion

WHEREFORE, based on the foregoing, petitioner respectfully requests that this Honorable Court grant his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. §2241.

Respectfully submitted,

/s/ Kenneth E. Bousley  
Kenneth Eugene Bousley  
Appearing *Pro Se*  
Reg. No. 04450-041  
Dorm 209, Room 116  
P.O. Box 1000  
Duluth, MN 55814

Dated: 6-6-94



UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION

Kenneth Eugene Bousley,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. _____
	)	
Joseph M. Brooks,	)	
Warden, FPC Duluth,	)	
	)	
Respondent.	)	

Memorandum of Law in Support  
of Petition for Writ of Habeas Corpus

Argument

THIS COURT SHOULD GRANT THE PETITION,  
SINCE THERE IS INSUFFICIENT EVIDENCE  
TO SUPPORT A GUILTY PLEA ON COUNT  
II OF THE INDICTMENT.

A. Introduction

The issue in petition is very direct: did the petitioner's plea allocution set forth a proper factual basis, pursuant to F.R.Cr.P. 11(f) to support a conviction under Count II of the indictment?

B. Plea Allocution Was Insufficient

F.R.Cr.P. 11 sets forth the procedural basis for a defendant entering a guilty plea to a criminal charge. Specifically, F.R.Cr.P. 11(f) requires that the court accepting the guilty plea make inquiry into the factual basis for the plea. The relevant portion of F.R.Cr.P. 11(f) is set forth as follows:

**Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

The Eighth Circuit has set a well defined standard for the factual basis which is required to support a guilty plea. In the recent case of *U.S. v. Schaefer*, 4 F.3d 679 (8th Cir. 1993), the Court reiterated that there must be a factual basis for the plea. (See *Schaefer*, pg. 681; see also *U.S. v. Oldham*, 787 F.2d 454 (8th Cir. 1986).

C. There is no legal basis for finding that the petitioner "used" a firearm "during and in relation to" a drug trafficking crime.

The United States Court of Appeals for the Eighth Circuit has repeatedly dealt with this issue of "use" of a firearm, as prohibited by 18 U.S.C. §1924(c). A problem area for the Eighth Circuit has continued to be the required proximity between the firearm and the drug transaction.

The Court of Appeals in two cases has described close factual cases where the issue before the court was the physical and practical proximity of the firearm to the drug transaction. In *U.S. v. Curry*, 911 F.2d 72 (8th Cir. 1990), the defendant was convicted under 18 U.S.C. §1924(c). Defendant's residence was a townhouse. When searched, police found a substantial quantity of cocaine, drug paraphernalia, large sums of cash, two guns and ammunition. The first floor closet contained a large suitcase containing 388 grams of 97% pure cocaine. On the

second floor of the townhouse was an operable, fully loaded .357 caliber revolver. This firearm was found, together with a .38 caliber revolver, in a master bedroom closet. (See *Curry*, pp. 78-79.)

Defendant Curry appealed on the basis that the evidence was insufficient to support the district court's finding that defendant "used" a firearm "during and in relation" to a drug trafficking transaction. (See *Curry*, pg. 78.) Although the Court of Appeals rejected defendant Curry's argument, the Court indicated that the "... facts here present a much closer question than those in our previous cases affirming conviction under §924(c)(1)." (See *Curry*, pg. 80.) The Court cited *U.S. v. Lyman*, 892 F.2d 751 (8th Cir. 1989) for the principal that, "[M]ore than mere possession of a firearm is required for a conviction under §924(c)(1)." The Court of Appeals narrowly rejected defendant Curry's position, cited among the factors were that Curry's drugs supply consisted not of small amounts of controlled substances.

In this case, the amount of drugs were insignificant, since the firearms in question were in a totally separate building from the garage, where the drug transaction occurred. The house where the guns were located was fifty feet from the garage. This distance, together with the petitioner's artificial leg, would have made it difficult indeed for the firearms to be used "during and in relation" to a drug trafficking transaction.

The Court of Appeals again grappled with this same issue in *U.S. v. Bennett*, 956 F.2d 1476 (8th Cir. 1992). Defendant Bennett had an apartment where he conducted drug transactions. When the apartment was searched,

police found drugs, paraphernalia and \$2700 cash in the living area. One loaded .41 magnum was found in the closet of the bedroom in the apartment. (See *Bennett*, pg. 1482) Defendant argued that there was insufficient evidence to support a conviction under 18 U.S.C. §924(c).

As with *Curry*, the Court rejected defendant Bennett's argument, although the Court did state, "[I]n *Curry* we stated that it's facts presented a much closer question than those in any of our previous cases affirming convictions under §924(c)(1) . . . The evidence here . . . presents a closer question than *Curry*." (See *Bennett*, pg. 1483.) In *Bennett*, the firearm was in a different room in an apartment, and the Court of Appeals called this a close question. The facts, as set forth in the petition, clearly demonstrate facts which present a much closer question. The instant case facts show that the firearm was in the bedroom of a house, and the drug transaction occurred approximately fifty (50) feet away in the garage.

The Eighth Circuit has consistently rejected appeals from §924(c) convictions with facts much less persuasive and clear than those in the instant case. (See *U.S. v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985)) (firearms found in small apartment in which 17 ounces of cocaine and cash were found sufficient to establish defendant's use of firearm); (*U.S. v. Brett*, 872 F.2d 1365 (8th Cir. 1989)) (evidence that loaded nine millimeter pistol was found in codefendant's possession during search of crack cocaine house was sufficient to support defendant's conviction); (*U.S. v. Jones*, 990 F.2d 1047 (8th Cir. 1993)) (gun hanging on back of bedroom door adjacent to bedroom closet with cash and drugs).

One of the few times that the Eighth Circuit reversed a ¶924(c) conviction was in *U.S. v. Robertson*, 706 F.2d 253 (8th Cir. 1983). In *Robertson*, a loanshark victim who saw a gun in a desk drawer presented insufficient evidence to support a ¶924(c) conviction. The reasoning in *Robertson* was the same as this court should employ: that there was no role of the firearm in the criminal transaction. (See *Robertson*, pg. 256.)

#### Conclusion

In light of the foregoing, petitioner Kenneth Eugene Bousley respectfully requests that this Honorable Court grant his Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. ¶2241.

Respectfully submitted,

/s/ Kenneth E. Bousley  
 KENNETH EUGENE BOUSLEY  
 Appearing *Pro Se*  
 Reg. No. 04450-041  
 Dorm 209, Room 116  
 P.O. Box 1000  
 Duluth, MN 55814

Dated: 6-6-94

#### UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA FIFTH DIVISION

\*\*\*\*\*  
 Kenneth Eugene Bousley,  
 Petitioner,  
 vs.

Joseph M. Brooks,  
 Warden,

Respondent.

ORDER DIRECTING  
 RESPONDENT TO SHOW  
 CAUSE WHY WRIT OF  
 HABEAS CORPUS  
 SHOULD NOT BE  
 GRANTED  
 and  
 REPORT AND  
 RECOMMENDATION

Civ. No. 5-94-87  
 (Filed Jul. 6, 1994)

\*\*\*\*\*  
 At Duluth, in the District of Minnesota, this 6th day  
 of July, 1994.

\* \* \*

This matter is before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. § 636(b)(1)(A) and (B), upon the filing of a Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2241. In this Petition, the Petitioner claims that he is being illegally detained by the Respondent for reasons which are violative of his rights under the Constitution, laws or treaties of the United States. Pursuant to the Court's routine, random assignment of Section 2241 Petitions, the Petition has been committed to the Honorable Michael J. Davis for final determination.



The Petition asserts that his conviction and sentence are illegal "since a factual basis did not exist for the guilty plea" underlying his conviction for use of a firearm during and in relation to a drug trafficking crime, in violation of Title 18 U.S.C. § 924(c). See, *Petition Form*, at 3. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." *Petition Attachment*, at 5. The Petitioner entered his plea of guilty on one Count of a violation of Section 924(c), as well as one Count of possession with intent to distribute methamphetamine in violation of Title 18 U.S.C. § 841(a)(1), before the United States District Court for the District of Minnesota, the Honorable Diana E. Murphy, Chief Judge, presiding ("the Sentencing Court").

Upon review, it is evident that the Petitioner's contentions rest exclusively within the jurisdiction of the Sentencing Court, pursuant to Title 28 U.S.C. § 2255.<sup>1</sup>

<sup>1</sup> In relevant part, Section 2255 provides as follows:

A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

As the language of Section 2255 makes clear, challenges to the legitimacy of an underlying conviction, or to a sentence which

As a consequence, these contentions are inappropriate subjects of a Writ under Section 2241.<sup>2</sup> In order to minimize any inconvenience to the Court and to the parties, we recommend that this Petition be reassigned to the Sentencing Court, which would have the requisite jurisdiction to resolve each of the claims that the Petitioner has raised.

NOW, THEREFORE, The Respondent is directed to show cause, within 20 days from the date of this Order, why relief should not be granted pursuant to Title 28 U.S.C. §§ 2241 or 2255:

1. By making a Return in writing;

was imposed upon that conviction, are exclusively governed by this Section, which vests the jurisdiction of such matters in the Sentencing Court. It is well-settled in this Circuit, that a Section 2241 Writ is limited to objections to the manner in which a sentence is being executed, and not to the validity of the sentence itself or the authority by which the Petitioner is being detained. *United States v. Hutchings*, 835 F.2d 185, 186 (8th Cir. 1987); *DiSimone v. Lacy*, 805 F.2d 321, 323 (8th Cir. 1986).

- <sup>2</sup> Section 2255 goes on to provide:

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

See also, *DiSimone v. Lacy*, 805 F.2d 321, 323 (8th Cir. 1986); *Von Ludwitz v. Ralston*, 716 F.2d 528 (8th Cir. 1983) (per curiam); *Edwards v. United States*, 826 F. Supp. 423, 426 (M.D.Fla. 1993).

2. By filing with the Court a reasoned memorandum of law and fact fully stating the Respondents' legal position, and their view on the need for this Court to conduct an evidentiary hearing on the merits of the Petition given the requirements of the applicable statutes and the pertinent United States Supreme Court authorities.

Absent compliance with this Order within the 20-day period, the Court will entertain a motion to grant relief to the Petitioner forthwith.

AND, It is -

RECOMMENDED:

That this Petition be reassigned for disposition to the Honorable Diana E. Murphy, Chief Judge.

/s/ Raymond L. Erickson  
 Raymond L. Erickson  
 UNITED STATES  
 MAGISTRATE JUDGE

#### NOTICE

Pursuant to Rule 6(a), Federal Rules of Civil Procedure, D. Minn. LR1.1(f), and D. Minn. LR72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties **by no later than July 21, 1994**, a writing which specifically identifies those portions of the Report to which objections are made and the bases of those objections. Failure to comply with this procedure shall operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

If the consideration of the objections requires a review of a transcript of a Hearing, then the party making the objections shall timely order and file a complete transcript of that Hearing **by no later than July 21, 1994**, unless all interested parties stipulate that the District Court is not required by Title 28 U.S.C. § 636 to review the transcript in order to resolve all of the objections made.

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION  
Civil No. 5-94-87  
Criminal No. 4-90-57

UNITED STATES OF AMERICA,	)	<b>MOTION OF THE</b>
	)	<b>UNITED STATES TO</b>
Respondent,	)	<b>DISMISS DEFENDANT'S</b>
	)	<b>PETITION FOR WRIT</b>
v.	)	<b>OF HABEAS CORPUS</b>
	)	<b>OR IN THE</b>
KENNETH EUGENE BOUSLEY,	)	<b>ALTERNATIVE FOR</b>
	)	<b>SUMMARY JUDGMENT</b>
Petitioner.	)	
	)	(Filed July 21, 1994)

Pursuant to Federal Rules of Civil Procedure 12 and 56, the United States, by its undersigned counsel, hereby moves to dismiss the above-captioned case with prejudice, or in the alternative moves for summary judgment.

The grounds for this motion are set forth in the accompanying memorandum. A proposed Order accompanies this motion.

Respectfully submitted,

Dated: 7/21/94

DAVID L. LILLEHAUG  
United States Attorney

/s/ Jeffrey S. Paulsen

BY: JEFFREY S. PAULSEN  
Assistant U.S. Attorney  
Attorney ID Number 144332

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION  
Civil No. 5-94-87  
Criminal No. 4-90-57

UNITED STATES OF AMERICA,	)	
	)	<b>MEMORANDUM IN</b>
Respondent,	)	<b>SUPPORT OF MOTION</b>
	)	<b>OF THE UNITED</b>
v.	)	<b>STATES TO DISMISS</b>
	)	<b>DEFENDANT'S</b>
KENNETH EUGENE BOUSLEY,	)	<b>PETITION FOR WRIT</b>
	)	<b>OF HABEAS CORPUS</b>
Petitioner.	)	

The defendant, Kenneth Eugene Bousley, has filed a Petition for Writ of Habeas Corpus on the ground that there allegedly was an insufficient factual basis for his guilty plea to using a firearm during and in relation to a drug trafficking offense. In a Report and Recommendation issued July 6, 1994, Magistrate Judge Erickson recommended treating this petition as a petition under 28 U.S.C. § 2255. Because the transcript shows clearly that an adequate factual basis was made, the defendant's petition should be denied and the case should be dismissed with prejudice.

#### FACTUAL BACKGROUND

On March 19, 1990, officers executed a search warrant at Bousley's residence at 5239 Humboldt Avenue North, Minneapolis, Minnesota. PSR ¶ 8 (Exhibit A to Defendant's Petition). Officers found approximately 7



pounds (3,153 grams) of methamphetamine in two separate briefcases in the garage. PSR ¶ 8. Two loaded firearms and one unloaded firearm were found with the drugs in the garage. *Id.* A coffee can containing an additional 33 grams of methamphetamine also was found in the garage. *Id.*

In the house, officers found 6.9 grams of methamphetamine in the bedroom along with two loaded handguns. *Id.* One of the loaded guns was concealed in the headboard of the bed. T.Plea at 16. Officers also seized \$4,838 in cash during execution of the search warrant. PSR at ¶ 8.

On June 15, 1990, the defendant pleaded guilty to Count I of the Superseding Indictment charging possession with intent to distribute methamphetamine, and Count II charging use of firearms during and in relation to a drug trafficking crime. He signed a written plea agreement acknowledging his guilt as to both charges. (Exhibit A at 1-3)<sup>1</sup>

At the guilty plea hearing, the defendant denied responsibility for the 7 pounds of methamphetamine in the briefcases in the garage, but admitted that the 33 grams in the coffee can and the 6.9 grams in the bedroom were his. T.Plea at 12. He further admitted that the 33 grams in the coffee can was methamphetamine he was planning to sell. *Id.* He also admitted that he had in fact made sales of methamphetamine from the garage area of his residence in the past, T.Plea at 15, including sales

<sup>1</sup> The original, fully executed plea agreement is in the archives of the Clerk's Office.

within the previous 72 hours prior to his arrest, T.Plea at 17.

With respect to the gun count, the defendant started to proffer an innocent excuse for the guns, but ultimately admitted that the firearms in the bedroom were available to assist him in his drug business. T.Plea at 15. The Court twice informed Bousley that he had the right to go to trial if he did not feel he was guilty of the gun offense. T.Plea at 16. The defendant voluntarily chose to continue with his plea of guilty. *Id.*

Prior to sentencing, the district court held an evidentiary hearing regarding the drug quantity for which the defendant was accountable. The defendant had the opportunity at that hearing, if he so chose, to make a record regarding his guilt or non-guilt of the gun charge. However, through his counsel, he specifically stated that there was no need to make a further factual record regarding the gun count to which he pleaded guilty. (Exhibit B at 3.)

## DISCUSSION

### I. THE DEFENDANT'S PETITION IS BARRED BY HIS FAILURE TO TAKE A DIRECT APPEAL ON THE ISSUE IN QUESTION

Bousley's petition is barred by his failure to take a direct appeal on the issue in question. The defendant did appeal to the Eighth Circuit, but raised only the issue of the drug quantity for which he is accountable. The Eighth Circuit affirmed his sentence. *United States v. Bousley*, 950 F.2d 727 (8th Cir. 1991)(unpublished). The defendant

could have, but did not, challenge on appeal the adequacy of the factual basis for his plea to Count II, the gun count.

The defendant has waived his right to challenge the sufficiency of his guilty plea by failing to take a direct appeal on the issue. A motion under 28 U.S.C. § 2255 is not a substitute for a direct appeal. *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), *cert. denied*, 113 S.Ct. 1351 (1993)(citing *United States v. Frady*, 456 U.S. 152, 165 (1982)). Any claims which could have been raised on direct appeal will not be considered in a Section 2255 proceeding unless the defendant can show just cause for failing to raise the claim on direct appeal, and that substantial, actual prejudice resulted from the alleged errors. *Ford v. United States*, 983 F.2d 897, 898 (8th Cir. 1993) (*per curiam*). The defendant has made no such showing. Thus, the defendant's failure to challenge the adequacy of his guilty plea on direct appeal precludes him from raising that issue now.

## II. AN ADEQUATE FACTUAL BASIS EXISTS FOR THE DEFENDANT'S PLEA TO COUNT II

In the event the Court reaches the merits, a conviction under 18 U.S.C. § 924(c) is sustainable if the firearm furthered the drug activity in any way. *United States v. LaGuardia*, 774 F.2d 317, 321 (8th Cir. 1985); *see also United States v. Brett*, 872 F.2d 1365, 1370 (8th Cir.), *cert. denied*, 493 U.S. 932 (1989). The "use" element of § 924(c) is met when the defendant has "ready access" to the firearm, the firearm "was an integral part of his criminal undertaking

and its availability increased the likelihood that the criminal undertaking would succeed." *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988). A defendant can "use" a firearm within the meaning of § 924(c) without firing, brandishing, or displaying it. *Lyman*, 892 F.2d at 753; *Matra*, 841 F.2d at 843.

The record in this case provides more than an adequate factual basis for the plea to Count II. The defendant kept a loaded handgun in the headboard of his bed, a readily accessible location. The defendant admitted making methamphetamine sales from the garage area of the residence, and further admitted that the guns in the bedroom were available to facilitate that drug dealing. In addition to his oral testimony, the defendant also signed a written acknowledgment of his guilt on Count II (Exhibit A at 2-3), which by itself is sufficient to sustain the conviction. *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir.), *cert. denied*, 498 U.S. 942 (1990); *United States v. Guichard*, 779 F.2d 1139, 1146 (5th Cir.), *cert. denied*, 475 U.S. 1127 (1986).

The Eighth Circuit on at least two occasions has upheld guilty pleas in § 924(c) cases under similar circumstances. In *Thomas v. United States*, 951 F.2d 902, 904 (8th Cir. 1991), the defendant admitted being a drug trafficker and also admitted ownership of three of the five weapons found in his bedroom when he was arrested. He denied, however, that the guns had anything to do with the drug trafficking. Despite the defendant's denial, the Eighth Circuit found a sufficient factual basis for his guilty plea to a § 924(c) count. 951 F.2d at 904.

Likewise, in *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir.), *cert. denied*, 498 U.S. 942 (1990), the Eighth Circuit found a sufficient factual basis where the defendant signed a plea agreement acknowledging that firearms found in the cab of his truck were available for his use in connection with the marijuana he was hauling in a hidden bed of the truck.

As in these cases, the record in this case is more than adequate to sustain the defendant's conviction on Count II.

### CONCLUSION

For the foregoing reasons, the defendant's Petition for a Writ of Habeas Corpus should be denied and this case should be dismissed.

Dated: 7/21/94

DAVID L. LILLEHAUG  
United States Attorney  
/s/ Jeffrey S. Paulsen  
BY: JEFFREY S. PAULSEN  
Assistant U.S. Attorney  
Attorney ID Number 144332

### UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA FIFTH DIVISION

Kenneth Eugene Bousley,	)	
	)	
Petitioner,	)	Civil No. 5-94-87
	)	Crim. No. 4-90-57
v.	)	
Joseph M. Brooks, Warden,	)	
FPC Duluth,	)	
	)	
Respondent.	)	

### Petitioner's Reply to Respondent's Motion to Dismiss or for Summary Judgment of Writ of Habeas Corpus

(Filed Aug. 12, 1994)

### Introduction

Petitioner's argument is based on the undisputed court record that petitioner did not use a firearm during and in relations to a drug trafficking transaction. (See 18 U.S.C. § 924(c); *See also* Transcript of Proceedings, Change of Plea, June 15, 1990, pp. 13 - 16, attached as Exhibit B to the Petition for Writ of Habeas Corpus. Hereinafter referred to as "Transcript".)

Respondent in turn argues that the petitioner testified that he used the firearms in relation to drug trafficking, and specifically argues the following points:

1. The petitioner did not take a direct appeal on the firearm issue, and:
2. A factual basis existed pursuant to F.R.Cr.P. 11(f) for the guilty plea.



In support of the second prong of his argument, respondent argues that case law supports his position, especially since the petitioner signed a plea agreement.

In light of the foregoing, petitioner files this reply, requesting the court to deny the respondent's requested relief.

#### Statement of Facts

[Please refer to ¶ 5 - 11, pp. 2 - 5, Petition for Writ of Habeas Corpus, filed July 5, 1994.]

#### Argument I

#### PETITIONER IS NOT BARRED FROM FILING A MOTION PURSUANT TO 28 U.S.C. §2255

Respondent argues that, pursuant to *Ford v. United States*, 983 F.2d 897 (8th Cir. 1993) (per curiam), any claims which could have been raised on direct appeal will not be considered in a motion pursuant to 28 U.S.C. §2255 unless just cause and actual prejudice can be demonstrated. (See Memorandum In Support of Motion of the United States to Dismiss Defendant's Petition for Writ of Habeas Corpus, pp. 3 - 5.)

Petitioner was represented by Mark W. Peterson. It is an undisputed fact that the petitioner disagreed with his counsel's advice *before* petitioner pled guilty. (See August 3, 1990 Bousley letter to Peterson, and August 7, 1990 Peterson response to Bousley, attached as Exhibit A. See also August 22, 1990 Bousley letter to Peterson and Peterson August 27, 1990 response, attached as Exhibit B.)

Even after the plea change, petitioner requested his counsel to appeal the firearms count. Mr. Peterson refused to do so. In fact, Mr. Peterson refused to afford petitioner any post-conviction relief consideration. (See October 30, 1991 Peterson letter to Bousley, attached as Exhibit C.)

Therefore, petitioner could not bring this issue to the attention of the appellate courts, since the counsel who rendered the original advice was understandably reluctant to pursue an appeal which questions his own professional advice.

#### Argument II

#### A FACTUAL BASIS DID NOT EXIST FOR THE TRIAL COURT TO ACCEPT PETITIONER'S GUILTY PLEA.

The respondent argues two specific cases in which the Eighth Circuit has upheld guilty pleas in §924(c) cases. (See Respondent Memorandum, pg. 5.) The two cases cited by the respondent are distinguishable on their facts.

The first case cited by the respondent is *Thomas v. United States*, 951 F.2d 902 (8th Cir. 1991). Defendant Thomas filed a §2255 motion seeking to vacate his sentence pursuant to a guilt plea on a §924(c) charge. Thomas owned 3 of 5 firearms found in the bedroom of the home from where 428 grams of crack cocaine were recovered. Thomas was also arrested in this bedroom. (See *Thomas, supra*, pg. 904.) The Eighth Circuit found that a factual basis existed for the guilty plea, since through his testimony Thomas admitted to owning the

firearms which were in the same house as the 428 grams of crack. (See *Thomas, supra*, pg. 904.)

As has been argued by the petitioner in ¶ 8 of the Petition for Writ of Habeas Corpus, the guns in this case were found in Petitioner's bedroom, but the drug trafficking occurred in the petitioner's garage, *which is over fifty (50) feet away from the house*. This is unlike defendant Thomas' case, where the crack cocaine was in the same house as the firearms, and easily accessible to Thomas.

Furthermore, as pointed out in ¶7 of the Petition, Petitioner has an artificial leg, and with the aid of a cane, can move about, but not quickly. Therefore, the concept that two small caliber guns in a house over 50 feet away from the site of the drug trafficking is ridiculous and without a realistic factual basis.

The respondent argues that the petitioner ultimately admitted that the firearms in the bedroom were available to assist him in his drug business. (See Respondent's Memorandum, pp. 2 - 3.)

The respondent's interpretation of pg. 15 of the transcript reflects a very vivid imagination. Petitioner clearly testified that the firearms were not available for "use in case something went wrong in drug trafficking." (See Transcript, pg. 15.) Petitioner ultimately testified that the firearms were available only in a theoretical sense, since the petitioner owned the weapons. Petitioner testified, and it is undisputed, that the drug trafficking occurred in the garage. (See Transcript, pg. 15.) It is inconceivable that the petitioner, who has an artificial leg and walks only with the aid of a cane, could "run" to the house from the garage to retrieve a small caliber gun if "something

went wrong in drug trafficking." Any reasonable person can obviously see from these facts that the firearms were technically available, but not readily available.

The second case cited by respondent is *United States v. Boucher*, 909 F.2d 1170 (8th Cir. 1990). The Eighth Circuit found in this case that there was a sufficient factual basis to support a guilty plea where the defendant signed a plea agreement which acknowledged the underlying facts to support a § 924(c) conviction.

The relevance of this case is very questionable, since the respondent has not provided an executed copy of the plea agreement. The plea agreement provided by the respondent as Exhibit A to the respondent's memorandum appears to be a draft. Therefore, this argument is without any factual basis.

### Conclusion

In view of the foregoing, this Court should grant the petition and deny the respondent's requested relief. The facts of the instant case are readily distinguishable from those cases advanced by the respondent. If the facts of this case are examined objectively, it is obvious that the petitioner has readily admitted what he actually did in violation of federal law. There was no connection between the drugs and the firearms in this case - the guns simply happened to be in the house well away from the drugs in the unattached garage.

In the event the Court is seriously considering granting the respondent's motion, Petitioner requests appointment of counsel and an opportunity for an evidentiary

hearing, so that the Court may hear the testimony of the petitioner on the points outlined in the petition and reply.

Respectfully Submitted,

/s/ Kenneth E. Bousley  
Kenneth Eugene Bousley  
 Appearing *Pro Se*  
 Reg. No. 04450-041  
 Dorm 209, Room 116  
 P.O. Box 1000  
 Duluth, MN 55814

Dated: 8-8-94

UNITED STATES DISTRICT COURT  
 DISTRICT OF MINNESOTA  
 FIFTH DIVISION

Kenneth Eugene Bousley,	)	
	)	
Petitioner,	)	Civil No. 5-94-87
	)	Crim. No. 4-90-57
v.	)	
	)	
Joseph M. Brooks, Warden,	)	
FPC Duluth,	)	
	)	
Respondent.	)	

Certificate of Service

The undersigned, upon penalty of perjury, certifies that a copy of the Petitioner's Reply to Respondent's Motion to Dismiss or for Summary Judgment of Petitioner's Writ of Habeas Corpus, together with exhibits, was mailed to the attorney representing the respondent indicated below, by

placing same in the United States mail receptacle at the Federal Prison Camp, Duluth:

Jeffrey S. Paulson, AUSA  
 234 United State Courthouse  
 110 South Fourth Street  
 Minneapolis, MN 55401

/s/ Kenneth E. Bousley  
Kenneth Eugene Bousley

Dated: 8-8-94

EXHIBIT A

Ken Bousley  
 5239 Humboldt Ave N  
 Minneapolis, MN 55430  
 August 3, 1990

Mark Peterson  
 Peterson & Singer  
 250 Northstar East  
 608 Second Avenue South  
 Minneapolis, MN 55402

Dear Mark:

You advised me that just the fact that I owned a gun made me guilty of the offense of use of a firearm during and in relation to drug trafficking, which was Count II of my indictment. But, after some research of my own, I find your statement to be untrue. Please read enclosed paper on "Use, Used."



The guns had nothing to do with drug transactions. The guns were in the house, and I was selling drugs out of the unattached garage. You said that "possession of" and "possession with intent" are two different offenses. The guns were in proximity only to the drugs that I possessed for my personal use, and not the drugs that I was selling. They were in two different buildings that are not attached. There was no ready access, nor were they used as an integral part of the offense with which I am charged.

The guns that I owned were: a PPK [sic] 380 and a four-shot .22, which the police found in the bedroom. The unloaded PPK [sic] 380 was in a cabinet next to the waterbed, on the bottom shelf, inside a vinyl bag that was zipped closed. The .22 four-shot that was loaded was in a video tape cassette box, under four or five other video cassette boxes, in the headboard of the waterbed.

I got the .22 derringer for my girlfriend, Jessie, because the slide on the PPK [sic] 380 would come back when it was fired, and if your hand was not holding it just right it would cut your hand. I wanted Jessie to have a gun because of the rape that happened to her shortly after we started seeing each other; the guy that broke into her house and raped her was never caught, and the emotional stress of all this was very hard on both of us - I never wanted anything like that to happen to her again. If it was not for the rape, I would not have had any guns around because of the kids. I won't even buy a toy gun for a kid, because I don't believe they are toys. I am not a violent person. The last fist fight I was in was back when I was still in school, and that was a long time ago.

Neither gun was in the garage, nor had ever been in the garage. I have never had ready access to a gun during any drug transaction, nor ever felt it was necessary to have a gun on or near me when I was selling drugs.

After reviewing this and the enclosed information, please call me so we can discuss this matter. Thank you.

Respectfully yours,

/s/ Ken Bousley  
Ken Bousley

KB:jls

Enc

---

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ADRIANE E. MESSICK

---

August 7, 1990

Kenneth E. Bousley  
5239 Humboldt Avenue North  
Minneapolis, MN 55430

**Re: United states v. Kenneth E. Bousley**

Dear Ken:

Enclosed please find the documents which have been filed on your behalf relative to sentencing, and also a copy of Magistrate Becker's Order modifying the conditions of your release.

I also am in receipt of your letter dated August 3, 1990, relative to the firearms count to which you pled guilty. My response is as follows.

1. I never advised you that "just the fact that (you) owned a gun . . . " made you guilty of the firearms offense. What I did tell you was that the law in the Eighth Circuit is clear that the mere presence and ready availability of a firearm at a location where drug dealing takes place constitutes "use" of a gun during a narcotics transaction. *United States v. Brett*, 872 F.2d 1365, 1370-71 (8th Cir.), cert. denied 110 S.Ct. 322 (1989); *United States v. Drew*, No. 88-2661, slip op. at 5 (8th Cir. January 17, 1990).

2. Although it is correct that more than mere possession is required for a conviction under the statute, it is not necessary that the person accused actually brandish or discharge the weapon in question. *United States v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988); *United States v. Lyman*, No. 89-5157, slip op. at 5 (8th Cir. December 29, 1989).

3. The government does not have to establish the specific intent to use a weapon or weapons in connection with a drug offense. The circumstances surrounding the presence of a firearm at a location where drug transactions take place permit the inference that they are present to be available for possible use. See *United States v. LaGuardia*,

774 F.2d 317, 321 (8th Cir. 1985); *United States v. Foote*, No. 89-1715, slip op. at 8 (8th Cir. March 15, 1990).

4. None of the cases which you enclosed with your letter cause me to change my opinion that under the facts and circumstances of your case, you would have been convicted of Count II had you gone to trial.

You obviously are free to form your own opinion as to the validity of your conviction on the firearms count, and it may well be that you can find another lawyer who would not share my opinion, and believe that Count II is defensible. If you are not satisfied with my opinion, or the basis for that opinion, I encourage you to seek other representation, as you obviously should have confidence in the advice which you receive. Should you decide to do so, I suggest that you make arrangements quickly, as I anticipate that sentencing will be scheduled within the next two or three weeks.

If you have any questions about my position in this matter, please feel free to contact me.

Sincerely yours,

/s/ Mark W. Peterson  
Mark W. Peterson

MWP/am  
Enclosures

EXHIBIT B

August 22, 1990

Mark Peterson, Atty  
Peterson & Singer  
250 Northstar East  
608 Second Avenue South  
Minneapolis, MN 55402

Dear Mark:

Thank you for your letters dated August 7 and August 16, 1990. I am sorry if I upset you. Please try to understand, I am trying to show you why I feel so strongly that I am not guilty of use of a firearm.

I had my guns in the bedroom because when Jessie was raped, she was raped in her bedroom. She lived in north Minneapolis at the time; we still live in north Minneapolis; the guy who did it was never caught. I believe these are valid reasons for having the guns in the bedroom, and for having guns to start with.

I did have 6.9 grams of methamphetamine in the bedroom, but for my Personal use, not to be sold. Also in the bedroom was about \$4,800.00 in cash. Is the proximity of the guns to the money the reason you believe I would be convicted of count II? The 33 grams of meth. that I had to sell, my scale, and the baggies were in the *unattached* garage. I feel very strongly that this is important - I did not sell drugs from the building in which the guns were found.

All of the cases I have read so far have common factors, which, as I see them, are as follows: large quantities of drugs (18 ounces in one case), large sums of cash

(\$18,950.00 in one case), drug paraphernalia, and guns, all of which were found in the same building. Also, there seems to have been no reason given for the presence of guns other than for drug dealing. The only case I understand to be similar to mine is U.S. v. Feliz-Cordero. In that case, the drug sale occurred in a separate residence from the one in which the gun was found - but the two residences were in the same building. The drug sale occurred in Apartment 5, the gun was found in Apartment 3.

In U.S. v. LaGuardia/Gato, how or why was Gato acquitted of the gun charge?

What are the facts and circumstances of my case that lead you to your belief that I would be found guilty if the case went to trial? As I see them, I think there is a good chance I would not be convicted of count II. Please help me to understand your viewpoint.

I made a mistake, and I am willing to accept responsibility for what I did, but I do not think it is just that I be charged with anything more, especially at the cost of 5 years of my life. Please try to understand that if I have to spend 5 years more for the guns, I don't want to spend them wondering why. Thank you for your help.

Respectfully yours,

/s/ Kenneth E. Bousley  
Kenneth E. Bousley



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JEANNE M. HERMES  
ADRIANE E. MESSICK

August 27, 1990

Kenneth E. Bousley  
5239 Humboldt Avenue North  
Minneapolis, MN 55430

**Re: United States v. Kenneth E. Bousley**

Dear Ken:

I am in receipt of your letter dated August 22, 1990. My response is as follows.

1. The primary factors upon which I base my opinion that you would have been convicted had you gone to trial on the firearms charge are as follows:

a) The presence of two firearms in your bedroom, which the police would testify were both loaded;

b) The presence of three firearms and seven pounds of methamphetamine in the briefcases in the garage;

c) Your admissions to both state and federal law enforcement officials regarding your activities in the garage and specifically your drug activity of the day before;

d) The amount of money seized;

e) The various drug-dealing paraphernalia which was seized, including the police scanners, additional ammunition, and money found in your bedroom; and

f) The close proximity of the garage to your house.

2. I have no idea why Ms. Gato was acquitted at trial. Apparently she was very lucky.

3. I obviously understand your desire to avoid spending any more time in prison than necessary. I also understand why you feel so strongly that you are not guilty of the firearms count, although I obviously disagree with the basis for your conclusion.

If you wish to have a jury trial on the firearm charge, you must first seek withdrawal of your guilty plea, pursuant to Rule 32(d), Federal Rules of Criminal Procedure. If it is your intent to try to withdraw your guilty plea, you should immediately obtain another lawyer to make that motion on your behalf.

Please contact me if you have any questions.

Sincerely yours,

/s/ Mark W. Peterson  
Mark W. Peterson

MWP/am

EXHIBIT C**PETERSON & SINGER  
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JEANNE M. HERMES  
ADRIANE E. MESSICK

October 30, 1991

Kenneth E. Bousley  
Reg. No. 04450-041  
Federal Prison Camp  
Box 1000, PMB 666  
Duluth, MN 55814

**Re: United States v. Kenneth Eugene Bousley**

Dear Ken:

I am in receipt of your letter dated October 27, 1991. I will address the questions and concerns which you have to the best of my ability.

1. The only practical way in which to challenge the amount of drugs which Judge Murphy found constituted your relevant conduct is through a petition for a writ of habeas corpus. There is no procedure by which additional evidence, such as an affidavit from John Innen, can be made a part of the record and argued on appeal as a basis

for changing your sentence. The only way in which additional evidence can be produced is through a hearing in the district court, pursuant to a writ of habeas corpus.

2. I am not planning on filing a writ of habeas corpus on Count II, the firearms charge. The first reason is that my appointment on appeal does not include further proceedings before the district court. The second reason is that we have thoroughly discussed this issue before; it remains my view that you would have been convicted of this offense had you gone to trial; and it is still my opinion that the proper advice was to plead guilty to this offense. Finally, since it is the basis of my advice that you would be challenging in a habeas petition, it obviously would be a conflict of interest for me to represent you on that petition.

3. To the best of my knowledge, it is the Bureau of Prisons, and not the sentencing judge, which determines the credit which you are to receive against any sentence, including the time which you served under house arrest. If the Bureau of Prisons has determined that you should not receive credit for this time, you should first appeal that decision administratively through the Bureau of Prisons, and if you are not successful, you should petition the court for a writ of habeas corpus on that issue as well.

I hope that this letter answers, at least to the extent possible, the matters discussed in your letter. If you need further information, please contact me; if not, the best of luck to you in future proceedings.

Sincerely yours,

/s/ Mark W. Peterson  
Mark W. Peterson

MWP/am

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION

\*\*\*\*\*  
Kenneth Eugene Bousley,  
Reg. No. 04450-041,

Petitioner,

vs.

Joseph M. Brooks, Warden,

Respondent.

\*\*\*\*\*

REPORT AND  
RECOMMENDATION

(Filed Mar. 14, 1995)

Civ. No. 5-94-87

At Duluth, in the District of Minnesota, this 14th day  
of March, 1995.

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to a general assignment, made in accordance with the provisions of Title 28 U.S.C. §636(b)(1)(B), upon a Petition for a Writ of Habeas Corpus. The Petitioner has appeared *pro se*, and the Respondent has appeared by Jeffrey S. Paulsen, Assistant United States Attorney.

For reasons which follow, we recommend that the Petition for a Writ of Habeas Corpus be dismissed.

II. Procedural and Factual History

On June 15, 1990, in the United States District Court for the District of Minnesota, the Petitioner entered pleas

of guilty on Counts I and II of a Superseding Indictment. In Count I, the Petitioner was charged with possessing, with an intent to distribute, methamphetamine, in violation of Title 21 U.S.C. §841(a)(1), while Count II charged him with using or carrying a firearm during and in relation to a drug trafficking offense, in violation of Title 18 U.S.C. §924(c).<sup>1</sup> These pleas were made during a Change of Plea Hearing.

On November 2, 1990, the District Court, the Honorable Diana E. Murphy presiding, sentenced the Petitioner to a term of 78 months for his conviction on Count I, to be followed by a consecutive sentence of 60 months for his conviction on Count II. The Petitioner is currently serving that sentence at the Federal Prison Camp at Duluth, Minnesota ("F.P.C., Duluth"). The Respondent is the Warden of that facility.

On July 5, 1994, the Petitioner filed this Petition for a Writ of Habeas Corpus, pursuant to Title 28 U.S.C. §2241, maintaining that there was an improper factual basis for his guilty plea on Count II of the Superseding Indictment. Necessarily, we treat the Petition as a Motion to Vacate a Sentence under Title 28 U.S.C. §2255.<sup>2</sup>

<sup>1</sup> Title 18 U.S.C. §924(c) provides, where relevant here:

Whoever, during and in relation to any crime of violence or drug trafficking crime \* \* \* for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years \* \* \* .

<sup>2</sup> In light of the nature of the Petitioner's challenge and the nature of the relief he requests, on July 6, 1994, we issued a



### III. Discussion

The Petitioner does not challenge the propriety of the 78-month sentence that was entered upon his plea of guilty to the possession with intent charge. Rather, the Petitioner confines his challenge to the consecutive 60-month sentence that resulted from his plea of guilty to

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Report and Recommendation that the Petition be considered as a Section 2255 proceeding, and be reassigned from District Judge Michael J. Davis, to Chief Judge Diana E. Murphy, who had imposed the Petitioner's sentence. See, *Title 28 U.S.C. §2255* (prisoner claiming that sentence is subject to collateral attack may move the Court "Which imposed the sentence to vacate, set aside or correct the sentence"). On July 25, 1994, our Report and Recommendation was adopted by the District Court. Accordingly, we examine the Petitioner's claims in the context of Section 2255.

In support of such an examination, we would further note that Section 2255 has long been interpreted as providing a remedy "as broad as habeas corpus," with its purpose "to afford the same rights as in habeas corpus, but with jurisdiction confined to the sentencing court." *Barkan v. United States*, 341 F.2d 95, 96 (10th Cir. 1965), cert. denied, 381 U.S. 940 (1965). A Writ of Habeas Corpus under Section 2241 "is not an additional, alternative, or supplemental remedy to the relief afforded by motion in the sentencing court under Section 2255" but, rather, the Section 2255 remedy "supplants that of habeas corpus and is exclusive unless it is shown that it is inadequate or ineffective to test the legality of the prisoner's detention." *Id.* at 95-96; see also, *Hill v. United States*, 368 U.S. 424, 427 (1962) (section 2255 remedy "exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the Petitioner was confined"); cf., *United States v. Hayman*, 342 U.S. 205, 219 (1952) ("nowhere in the [legislative] history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions"); *United States v. Giddings*, 740 F.2d 770, 774 (9th Cir. 1984).

the charges of Count II. In this respect, the Petitioner claims that the Sentencing Court accepted his guilty plea without establishing a factual basis for that plea, in violation of Rule 11(f), Federal Rules of Criminal Procedure. Specifically, the Petitioner asserts that "the plea allocution proffered by the petitioner was insufficient, since it did not indicate [a] connection between the firearms in the bedroom of the house, and the garage, where the drug trafficking occurred." *Petition Attachment*, at 5.

A. *Standard of Review.* Rule 11(f), Federal Rules of Criminal Procedure, provides as follows:

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

For the purposes of Rule 11(f), "a factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense." *United States v. Marks*, 38 F.3d 1009, 1012 (8th Cir. 1994); *Gregory v. Solem*, 774 F.2d 309, 312 (8th Cir. 1985), cert. denied, 475 U.S. 1088 (1986). The Rule requires the Sentencing Court to establish "that the conduct which the defendant admits constitutes the offense charged and that the Government has evidence from which a reasonable juror could conclude that the defendant was guilty as charged." *United States v. Ford*, 993 F.2d 249, 253 (D.C. Cir. 1993), citing *Notes of Advisory*

*Committee, Rule 11(f), Federal Rules of Criminal Procedure, 1966 Amendment.*<sup>3</sup>

B. *Legal Analysis.* In determining whether the Sentencing Court complied with the requisites of Rule 11(f), we must consider the nature and elements of the offense upon which the Petitioner entered his plea of guilty. In order to establish guilt, Title 18 U.S.C. §924(c) requires proof of the following two separate elements:

First, the prosecution must demonstrate that the defendant used or carried a firearm. Second, it must prove that the use or carrying was during and in relation to a drug trafficking crime.

*United States v. Simms*, 18 F.3d 588, 592 (8th Cir. 1994), quoting, *Smith v. United States*, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2050, 2053 (1993). With these elements of proof in mind, we note that, at the commencement of the Change of Plea Hearing, the Court accepted a plea agreement, that the Petitioner had signed and that detailed the sentencing stipulations. *Petitioner's Exhibit B. Transcript to Hearing of June 15, 1990 ("Hearing Transcript")*, at 2; *Government's Exhibit A, Plea Agreement and Sentencing Stipulations*. Those agreed upon stipulations included the following factual basis for the petitioner's plea:

<sup>3</sup> In fact, as long as there is a strong factual basis supporting a guilty plea, it is valid even if it is accompanied by claims of innocence – a so-called "Alford plea." See, *North Carolina v. Alford*, 400 U.S. 25 (1970); *White v. United States*, 858 F.2d 416, 423 (8th Cir. 1988), cert. denied, 489 U.S. 1029 (1989), citing *White Hawk v. Solem*, 693 F.2d 825, 829 (8th Cir. 1982), cert. denied, 460 U.S. 1054 (1983).

The parties also agree that, on or about March 19, 1990 \* \* \* the defendant knowingly used firearms during and in relation to a drug-trafficking offense, namely the offense of possession with the intent to distribute methamphetamine. The following firearms were found in the [Petitioner]'s bedroom near the 6.9 grams of methamphetamine: a loaded Walther PBK .380 caliber handgun, serial number A016494; and a loaded .22 caliber Advantage Arms 4-shot revolver. The [Petitioner] admits ownership and possession of these two guns.

The Court also heard the Petitioner's sworn admission that he had been in possession of the 6.9 grams of methamphetamine that had been seized from his bedroom, and the 33 grams that had been uncovered in a coffee can in his garage. *Transcript*, at 12. He also testified that he planned on selling the methamphetamine that was contained in the coffee can. *Id.* Further, he admitted to having been in possession of the two firearms that had been seized from his bedroom, to the fact that the guns were found in close proximity to the methamphetamine, and to the fact that one of the guns had been loaded with ammunition. *Id.* at 14, 16. He also unqualifiedly acknowledged that seven pounds of methamphetamine, as well as three additional weapons, had been found in the garage upon the execution of the Search Warrant on March 19, 1990. *Id.* at 14-15.

Although the Petitioner denied that he had ever sold methamphetamine out of his house, he admitted that, in the past, he had trafficked that substance in his garage. *Transcript*, at 15. He denied that he kept the guns in his



bedroom in order to assist in a drug deal, but acknowledged that the guns "were there for protection." *Id.* In addition, he admitted that these same weapons "were available" if he had ever needed a firearm during his previous sales of illicit drugs. *Id.* Nevertheless, he maintained that "they weren't right out in the open, you know, I couldn't just reach over and grab it." *Id.* at 16.<sup>4</sup>

Based upon our thorough review of the Record before the Sentencing Court, as well as the Transcript of the Hearing at which the plea of guilty plea to Count II was accepted, we are satisfied that the Sentencing Court had an adequate factual basis for the plea, as is required by Rule 11(f). Generally, to be used "in relation to" a drug trafficking offense, the "firearm must have some purpose or effect with respect to the drug trafficking, offense," and must at least "facilitate, or have the potential of facilitating, the drug trafficking offense." *Smith v. United States*, supra at 2059; *United States v. Hughes*, 15 F.3d 798, 803 (8th Cir. 1994); *United States v. Mejia*, 8 F.3d 3, 5 (8th Cir. 1993).

It is also well-settled in this Circuit that, in order to show that the Petitioner "used" the firearms in relation to

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<sup>4</sup> Also before the Court were the Receipt, Inventory and Return that had been completed by the officers who executed the Search Warrant at the Petitioner's residence on March 19, 1990. These documents corroborated his admissions by confirming that small baggies, which contained suspected methamphetamine, had been seized from a coffee can in his garage and in his master bedroom, and that two firearms – a Walther PBK.380 caliber handgun and a .22 caliber Advantage Arms 4-shot revolver – had been located in the same master bedroom. *Petitioner's Exhibit D.*

his drug-trafficking activities, the Government need not prove that he was in actual possession of the firearm, or that he brandished or discharged it. *United States v. Newton*, 31 F.3d 611, 613 (8th Cir. 1994); *United States v. Wolfe*, 18 F.3d 634, 637 (8th Cir. 1994). Instead, the Jury need only find a sufficient nexus between the gun and the drug trafficking crime. *United States v. Simms*, supra at 592, citing *United States v. Watson*, 953 F.2d 406, 409 (8th Cir. 1992). Where, as here, the weapon was in close proximity to the drugs and was readily accessible, the evidence is sufficient to support a Section 924(c) conviction. See, *United States v. Horne*, 4 F.3d 579, 587 (8th Cir. 1994) (use of weapon includes "presence and ready availability" of firearm at residence), cert. denied, 114 S.Ct. 1121 (1994); *United States v. Jones*, 23 F.3d 1407, 1409 (8th Cir. 1994); *United States v. Townsley*, 929 F.2d 365, 368 (8th Cir. 1991).

The Petitioner complains that the guns were kept in his bedroom, and that his drug trafficking occurred in his garage, which was a "totally separate building." *Memorandum*, at 3. However, to establish the necessary nexus between the gun and the drug trafficking crime, "the gun need not 'be located in the room where the drug transaction occurs.'" *United States v. Simms*, supra at 592, quoting *United States v. Horne*, supra at 587. Instead, the controlling factor is whether the placement of the weapons supports their ready accessibility if needed in an emergency. See, *United States v. Boykin*, 986 F.2d 270, 274 (8th Cir. 1993), cert. denied, 114 S.Ct. 241 (1994), citing *United States v. Lyman*, 892 F.2d 751, 754 n. 4 (8th Cir. 1989), cert. denied, 498 U.S. 810 (1990).

In applying these precepts, we reject the Petitioner's suggestion that his garage and bedroom – which he



alleges to be about 50 feet apart – were too far distant to allow the necessary nexus which was an essential feature of his plea agreement. While the Petitioner has claimed that the guns were kept hidden in his bedroom principally to facilitate his girlfriend's protection, we find his other admissions at the Hearing of June 15, 1990, to the contrary. For instance, he testified that these weapons were available to him during his drug trafficking activities at his residence, if and when they were needed. Compare, *United States v. Boucher*, 909 F.2d 1170, 1175 (8th Cir. 1990), cert. denied, 498 U.S. 942 (1990). As a consequence, even if we account for the Petitioner's admitted ambulatory limitations – owing to his artificial leg – the firearms he stored in his bedroom served the purpose of assuring his safety, and the security of his premises, during the conduct of his illegal drug-related activities. This is the same bedroom as to which the petitioner admitted to have stored 6.9 grams of methamphetamine. Accordingly, this evidence is wholly sufficient to establish the close proximity and the ready accessibility, which is needed to support a Section 924(c) conviction. *United States of America v. Rockelman*, No. 94-2222, Slip Op. at 8 (8th Cir. March 1, 1995); *United States v. Horne*, supra at 587; *United States v. Jones*, supra at 1409; *United States v. Townsley*, supra at 368. Thus, the Petitioner admitted to the Sentencing Court that he maintained weapons at his residence, which facilitated his drug transactions.

As his plea agreement makes clear, the petition admitted his ownership of the two weapons that had been seized in his bedroom, and these weapons formed the basis of his voluntary plea of guilty to the Section

924(c) charges. Therefore, because the Petitioner's testimony before the sentencing Court established a proper factual basis for his plea, and "[b]ecause the plea agreement's description of the essential facts underlying the charges supports a finding of guilt, we hold that [the Petitioner]'s acknowledgement of the accuracy of the plea agreement's provisions satisfies Rule 11's requirement that the court establish a factual basis for the defendant's guilt." *United States v. Abdullah*, 947 F.2d 306, 309 (8th Cir. 1991), cert. denied, 112 S.Ct. 1969 (1992).

WHEREFORE, It is –

RECOMMENDED:

That the Petition for a Writ of Habeas Corpus be dismissed.

/s/ Raymond L. Erickson  
Raymond L. Erickson  
 UNITED STATES  
 MAGISTRATE JUDGE

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FIFTH DIVISION  
Civil No. 5-94-87

Kenneth Eugene Bousley,  
Reg. No. 04450-041,

Petitioner,

**ORDER**

(Filed May 22, 1995)

v.

Joseph M. Brooks,  
Warden,

This matter is before the court upon petitioner's objections to a Report and Recommendation of United States Magistrate Judge Raymond L. Erickson dated March 14, 1995. Petitioner objects to the magistrate judge's recommendation that his Petition for a Writ of Habeas Corpus be dismissed.

Based upon a de novo review of the record herein, the court adopts Magistrate Judge Erickson's Report and Recommendation dated March 14, 1995. Accordingly, **IT IS HEREBY ORDERED** that the Petition for a Writ of Habeas Corpus is dismissed.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: May 18, 1995

/s/ David S. Doty  
David S. Doty, Judge  
United States  
District Court

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

KENNETH EUGENE BOUSELY

Reg. No. 04450-041

Case No. Civ. 5-94-97

v.

**JUDGMENT IN A CIVIL CASE**

JOSEPH M. BROOKS, WARDEN

- ( ) **July Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- (X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

that the Petition for a Writ of Habeas Corpus shall be, and hereby is, dismissed.

DATED: May 22, 1995

FRANCIS E. DOSAL, CLERK  
By /s/ Susan E. Anderson  
Susan Anderson,  
Deputy Clerk

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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No. 95-2687

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Kenneth Eugene Bousley,	*
Appellant,	* Appeal from the
v.	* United States District
Joseph M. Brooks, Warden,	* Court for the District
Appellee.	* of Minnesota.

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Submitted: July 26, 1996

Filed: October 3, 1996

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Before BOWMAN, BEAM, and LOKEN, Circuit Judges.

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BEAM, Circuit Judge.

Kenneth E. Bousley was convicted in 1990, upon a plea of guilty, for drug trafficking and use of a firearm in relation to a drug offense. He now appeals from the district court's<sup>1</sup> dismissal of his 28 U.S.C. § 2255 habeas corpus petition. We affirm.

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<sup>1</sup> The Honorable David S. Doty, United States District Judge for the District of Minnesota, adopting the recommendations of the Honorable Raymond L. Erickson, United States Magistrate Judge for the District of Minnesota.

## I. BACKGROUND

On March 19, 1990, police officers executed a search warrant at Bousley's home in Minneapolis, Minnesota. The officers found two coolers in Bousley's garage. Inside the coolers were two briefcases containing approximately seven pounds (3,153 grams) of methamphetamine. One of the coolers also contained two loaded handguns and one unloaded handgun. A coffee can in the garage contained an additional 33 grams of methamphetamine. The officers found another 6.9 grams of methamphetamine and two loaded handguns in Bousley's bedroom.

Bousley was charged with possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and with use of a firearm in relation to a drug offense pursuant to 28 U.S.C. § 924(c). Bousley admitted that he had been selling methamphetamine from his garage. He also admitted knowledge of the drugs and firearms in his bedroom, as well as of the drugs found in the coffee can in the garage. Bousley disclaimed knowledge of the drugs and firearms found inside the two coolers.

Bousley entered a plea of guilty to both the drug and firearms charges. The plea agreement stipulated that Bousley could challenge the amount of drugs that would be used to determine his sentence. In accordance with this agreement, the district court held an evidentiary hearing at which it received exhibits and took testimony from Bousley and FBI Special Agent Michael Kelly, who had interviewed Bousley after his arrest. Based on the hearing and on Bousley's presentence report, the district court determined that Bousley's sentence for the drug



charge would be based on the 946.9 grams of methamphetamine found in Bousley's bedroom, in the coffee can, and in one of the two briefcases in the garage. The court decided not to consider the approximately five pounds of drugs found in the second briefcase in determining the relevant conduct for which Bousley was accountable. The court sentenced Bousley to a term of seventy-eight months for the section 841(a)(1) drug charge and to a consecutive mandatory sixty-month sentence under § 924(c) for use of the firearms in relation to the drug offense.

Bousley appealed his sentence under the drug charge. This court affirmed. *United States v. Bousley*, No. 90-5598 (8th Cir. Sept. 25, 1991). Bousley then brought this habeas corpus action pursuant to 28 U.S.C. § 2255. Bousley claims: (1) that his plea of guilty to the section 924(c) firearms charge is not supported by an adequate factual basis; and (2) that section 924(c) is unconstitutionally vague. The district court dismissed the petition and Bousley appeals. After Bousley filed his appeal, the United States Supreme Court clarified the scope of section 924(c) in *Bailey v. United States*, 116 S. Ct. 501 (1995). Bousley then supplemented his brief, arguing that *Bailey* requires us to set aside his guilty plea.

## II. DISCUSSION

We review the district court's dismissal of Bousley's section 2255 petition de novo. *Holloway v. United States*, 960 F.2d 1348, 1351 (8th Cir. 1992). In the proceedings below, the government argued that Bousley waived his right to challenge his conviction in a collateral action

because he failed to preserve this issue in his prior appeal. While the district court considered the merits of Bousley's claims in dismissing the petition, we find the waiver issue dispositive.

### A. Waiver

A petitioner who fails to raise an issue on direct appeal is thereafter barred from raising that issue for the first time in a section 2255 habeas corpus proceeding. *Reid v. United States*, 976 F.2d 446, 447 (8th Cir. 1992), cert. denied, 507 U.S. 945 (1993) (citing *United States v. Frady*, 456 U.S. 152, 165 (1982)). Such a waiver applies to convictions pursuant to plea agreements as well as to those rendered after trial. See *id.* at 448 (defendant convicted of section 924(c) violation after nolo contendere plea pursuant to a plea agreement is barred from challenging conviction in section 2255 action). A petitioner is excused from a procedural default only if he can show both (1) a cause that excuses the default, and (2) actual prejudice from the errors that are asserted. *Id.*

In his prior appeal, Bousley challenged only the propriety of the sentence imposed for his possession of methamphetamine. *Bousley*, No. 90-5598, slip op. at 1. Bousley did not appeal the adequacy of the factual basis of his guilty plea, nor did he argue that section 924(c) is unconstitutionally vague. Absent a showing of cause and prejudice, Bousley may not now bring these claims through collateral attack.

Bousley argues that he is not barred from collaterally challenging his conviction, despite his default, because of the Supreme Court's ruling in *Bailey*. In *Bailey*, the Court

held that "use" of a firearm under section 924(c) requires a showing of "active employment" of the firearm, a more stringent standard than this Circuit had previously applied. *Bailey*, 116 U.S. at 505. Bousley argues that because neither he nor his counsel could have foreseen the decision in *Bailey*, he has not waived a challenge to his conviction.

We disagree. This court recently held in *United States v. McKinney*, 79 F.3d 105, 109 (8th Cir. 1996), that *Bailey* does not resurrect a challenge to a section 924(c) conviction that has been procedurally defaulted.<sup>2</sup> The defendant in *McKinney* had been convicted after trial, rather than, as here, upon a guilty plea. *Id.* at 107. However, Bousley's plea cannot excuse his procedural default. Indeed, a defendant who enters a guilty plea with no conditions as to guilt "waives all challenges to the prosecution of his or her case except for those related to jurisdiction." *United States v. Jennings*, 12 F.3d 836, 839 (8th Cir. 1994) (citing

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<sup>2</sup> In urging that "*Bailey* should be held retroactively applicable to [his section] 2255 motion," Bousley claims that *McKinney* "is alone in denying relief under *Bailey* to appellants with pending cases . . . and would set this court alone against all other courts that have addressed the issue." Supplemental Brief of Appellant at 3, 5. As an initial matter, a panel of this court is not free to disregard another panel decision. *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996). Even were we able to do so, Bousley's assertion is groundless. The retroactive effect of *Bailey* is a distinct issue from whether a defendant has waived the right to collateral review by failing to preserve an issue on appeal. This court has not hesitated to remand section 924(c) convictions for reconsideration in light of *Bailey* when the defendant preserved the issue by properly challenging the conviction on direct appeal. See, e.g., *United States v. Webster*, 84 F.3d 1056, 1066-68 (8th Cir. 1996).

*Smith v. United States*, 876 F.2d 655, 657 (8th Cir.), cert. denied, 493 U.S. 869 (1989)). Collateral review of a guilty plea is therefore "ordinarily confined to whether the underlying plea was both counseled and voluntary." *United States v. Broce*, 488 U.S. 563, 569 (1989).

As this case illustrates, a plea agreement is a process of negotiation and concession. Bousley pleaded guilty, but was afforded by stipulation in the plea agreement the opportunity to contest the amount of methamphetamine for which he would be held accountable. This concession allowed the district court to determine that it would not consider for sentencing purposes five pounds of the drugs found in Bousley's garage. We will not allow this process to be undone years after the fact, nor does Bousley cite any authority that compels us to upset the finality of such a plea agreement.<sup>3</sup> We are therefore convinced that procedural default and waiver apply to those convictions that follow a guilty plea no less than to those that follow a trial.<sup>4</sup>

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<sup>3</sup> Bousley argues that *Davis v. United States*, 417 U.S. 333 (1974), compels us to reopen his plea. As counsel conceded at oral argument, however, *Davis* involved a conviction after a trial and a direct appeal in which the petitioner presented the same issue raised later in his section 2255 action. This is a far cry from a collateral attack of a conviction resulting from a plea agreement.

<sup>4</sup> We acknowledge that the Tenth Circuit in *United States v. Barnhardt*, 93 F.3d 706 (10th Cir. 1996) permitted a collateral attack on a section 924(c) conviction following a guilty plea. For the reasons discussed in the text, however, we decline to follow our sister circuit on this point.



As the district court noted, the record shows that Bousley acknowledged ownership of at least some of the methamphetamine and firearms found in his garage and bedroom and admitted selling drugs from his garage. Before accepting Bousley's plea, the sentencing court meticulously advised Bousley of his rights to counsel and to a jury trial, explained that he would be subject to mandatory minimum sentences, and inquired whether Bousley had been threatened or pressured to plead guilty. The court also advised Bousley that a guilty plea would foreclose an appeal of his conviction, and Bousley indicated that he understood this. Bousley was fully advised of his rights and understood that he was waiving those rights by pleading guilty. Because there is no indication that Bousley's plea was involuntary or uninformed, he has waived the right to collateral review of his conviction unless he can show cause for his procedural default and resulting prejudice. *Ford v. United States*, 983 F.2d 897, 898 (8th Cir. 1993).

### B. Cause and Prejudice

Bousley's only argument to excuse his default is that he received ineffective assistance of counsel during his plea and sentencing. See *United States v. Ward*, 55 F.3d 412, 413 (8th Cir. 1995) (citing *Frady*, 456 U.S. at 167-68) (ineffective assistance of counsel may constitute "cause" to excuse procedural default in a section 2255 action). Specifically, Bousley claims that his counsel failed to pursue a viable defense, was "prosecutorial" in examining him during his sentencing, refused to research existing law, and refused to honor Bousley's request to appeal his conviction under section 924(c).

We have carefully examined the record and find Bousley's arguments to be without merit. To be constitutionally deficient, counsel's performance must fall "below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In examining whether an attorney failed to meet this standard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Other than the generalized assertions noted above, Bousley points to no instances in which counsel failed to adequately represent him, much less that his counsel's actions fell below the constitutional minimum *Strickland* requires. Bousley's counsel did recommend that Bousley not pursue an appeal of his section 924(c) conviction, but that recommendation was not unreasonable given counsel's understanding of this court's interpretation of section 924(c) before *Bailey*. In any event, counsel fully explained his reasons for declining to appeal the conviction to Bousley, and advised Bousley that he should seek other counsel if he was determined to press that issue on appeal. These actions do not rise to a constitutionally deficient level of unreasonableness.

Because Bousley has not shown that his counsel's representation fell below an objective standard of reasonableness, he has failed to establish that he received ineffective assistance from counsel. We therefore find no cause for Bousley's procedural default, and need not examine the "prejudice" element of Bousley's claim. Bousley has waived his right to collateral review of his section 924(c) conviction by pleading guilty and by failing to challenge the conviction on direct appeal.



### III. CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of Bousley's petition.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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### UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 95-2687MND

Kenneth Eugene Bousley, \*

Appellant, \*

v. \*

Joseph M. Brooks, Warden, \*

Appellee. \*

\* Appeal from the United  
\* States District Court for  
\* the District of  
\* Minnesota

### JUDGMENT

(Filed Jan. 06, 1997)

This appeal from the United States District court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

October 3, 1996

A true copy.

ATTEST: /s/ Michael E. Gans  
CLERK, U.S. COURT OF APPEALS,  
EIGHTH CIRCUIT

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